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In the Supreme Court of the United States

OCTOBER TERM, 1993

PIPER AIRCRAFT CORPORATION

Petitioner,

v.

EDWARD CHARLES CLEVELAND,
by and through the Conservator
of his Estate, Kathleen Cleveland,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

APPENDIX

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1. Opinion of the Court of Appeals, *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (Feb. 16, 1993)

Edward Charles CLEVELAND, By and Through the Conservator of his Estate Kathleen CLEVELAND, Plaintiff-Appellee,

v.

PIPER AIRCRAFT CORPORATION, a corporation, Defendant-Appellant.

Association of Trial Lawyers of America, and Aviation Manufacturers Association, Aircraft Owners and Pilots Association (AOPA), United States of America. Amici Curiae.

No. 91-2065

United States Court of Appeals, Tenth Circuit

Feb. 16, 1993

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Before LOGAN, Circuit Judge, LAY, Senior Circuit Judge[1] and BARRETT, Senior Circuit Judge.

LAY, Senior Circuit Judge.

Piper Aircraft Corporation brings this interlocutory appeal under 28 U.S.C. § 1292(b), challenging pre-trial rulings by the district court. Edward Cleveland brought suit against Piper for injuries he received in 1983 while piloting a Super Cub airplane, which crashed during takeoff. He alleged he suffered severe injuries due to the negligent design of the plane. In May 1986, a jury returned a $2.5 million verdict in favor of Cleveland.[2] On appeal this court determined the special verdict form improperly restricted jurors from allocating fault to all potentially responsible parties. *See Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540, 1546-51 (10th Cir.1989), *reh'g denied,* 898 F.2d 778 (10th Cir.1990). A new trial was awarded Piper. On remand, the district court permitted Piper to amend its answer and assert a defense that state common law was preempted by the Federal Aviation Act of 1958 and its

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[1] Honorable Donald P. Lay, Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

[2] After considering the jury's findings on Piper's culpability, the trial judge reduced the award to $1,042,500 plus post-judgment interest and costs.

corresponding regulations.[3] The district court, among other rulings, denied Piper's motion for summary judgment on this defense. Additionally, the trial court granted plaintiff's motion to limit the second trial to the issue of liability and ruled that only the witnesses and exhibits presented in the first trial could be introduced in the second trial. Piper sought permission to appeal these rulings under 28 U.S.C. § 1292(b); the trial court certified the appeal and this court granted permission.

I. FACTS

Cleveland was injured July 8, 1983 while attempting to take off from the Mid-Valley Airport in Los Lunas, New Mexico, in a Piper Super Cub Model PA-18-150. The plane was towing a glider that was attached by rope to the aircraft's tail. Cleveland and a cinematographer were planning to film the glider's flight for a television commercial. With assistance from a Federal Aviation Administration (FAA) certified mechanic, Cleveland had removed the front pilot's seat from the plane and installed a camera. At the time of the accident, Cleveland was piloting the plane from the rear pilot seat[4]

A few days before Cleveland planned to shoot the commercial, the owner of the Mid-Valley Airport became concerned about the safety of the operation and about compliance with FAA regulations. The owner closed the airport to prevent Cleveland from taking off. On the morning of the accident, the owner noticed activity at the airport and parked his van in the runway to prevent takeoffs and landings. Shortly thereafter, Cleveland attempted to fly the reconfigured Piper airplane. During takeoff, the aircraft struck the owner's parked

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[3] *See* 49 U.S.C.App. §§ 1301 *et seq.* (1988).

[4] As we noted previously, evidence at trial showed Piper "permitted the plane to be flown from the rear seat and provided a large trapezoidal window for photography." *Cleveland,* 890 F.2d at 1554.

van. Cleveland's head struck the camera, resulting in serious head and brain injuries.

Cleveland's wife, the conservator of his estate, brought this diversity action against Piper, which manufactured and sold the Super Cub in 1970. At the conclusion of the trial, a jury determined that Piper negligently designed the aircraft without adequate forward vision from the rear seat and negligently failed to provide a rear shoulder harness. However, the jury was not asked to compare the negligence of the parties responsible for the initial collision--the plane striking the van--with the negligence of those responsible for the second injury--Cleveland's head striking the camera. On this basis, we reversed and ordered a new trial. *Id.* at 1546.

II. FEDERAL PREEMPTION

Piper claims that the district court erred in denying its motion for summary judgment on preemption grounds. The basic principles of law in this area are well settled. Piper argues that the Federal Aviation Act of 1958, 49 U.S.C.App. §§ 1301 *et seq.*, and the regulations it has spawned impliedly preempt state tort actions by occupying the field of airplane safety. It asserts that the web of federal laws and regulations govern the field in a comprehensive manner, leaving no room for state regulation. Preemption questions turn on congressional intent. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299, 108 S.Ct. 1145, 1150, 99 L.Ed.2d 316 (1988). The mere fact that Congress has enacted detailed legislation addressing a matter of dominant federal interest does not indicate an intent to displace state law entirely. *English v. General Elec. Co.*, 496 U.S. 72, 87, 110 S.Ct. 2270, 2279, 110 L.Ed.2d 65 (1990); *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 716-20, 105 S.Ct. 2371, 2376-79, 85 L.Ed.2d 714 (1985). Congress may reserve for the federal government the exclusive right to regulate safety in a given field, yet permit the states to maintain tort remedies covering much the same territory. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 253, 104 S.Ct. 615, 624, 78 L.Ed.2d 443 (1984). This is so even though an award of damages may have the same effect as direct state regulation. *See*

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959). The Supreme Court has recently emphasized:

> Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress."

Cipollone v. Liggett Group, Inc., — U.S. —, —. 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)).

The district court determined the plain language of the Federal Aviation Act suggests that congress intended that the Act have no general preemptive effect. We agree.

Congress enacted the Federal Aviation Act of 1958, Pub.L. No. 85-726, 72 Stat. 731, "to establish a new Federal agency with powers adequate to enable it to provide for the safe and efficient use of the navigable airspace by both civil and military operations." H.R.Rep. No. 2360, 85th Cong., 2d Sess. 1, *reprinted in* 1958 U.S.C.C.A.N. 3741, 3741. The Act directed the Federal Aviation Agency to regulate "air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense." Pub.L. No. 85-726, § 103, 72 Stat. 740 (1958) (codified at 49 U.S.C.App. § 1303 (1988)). Although the legislative history states the Act provides the Federal Aviation Agency with "full responsibility and authority" over safety, H.R.Rep. No. 2360, *reprinted in* 1958 U.S.C.C.A.N. at 3741, the Act also assigned the Civil Aeronautics Board responsibility for safety,[5] "emphasized . . .

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[5] Pub.L. No. 85-726, § 102, 72 Stat. 740 (1958) (current version at 49 U.S.C.App. § 1302 (1988)); H.R.Rep. No. 2360, *reprinted in* 1958 U.S.C.C.A.N. at 3747-48.

that air carriers themselves retained certain responsibilities,"[6] and did not address what, if any, responsibility remained for the states.

The Act contains a savings clause that states:

> Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

49 U.S.C.App. § 1506. As other courts have held, this section shows that Congress did not intend to occupy the field of airplane safety to the exclusion of the state common law.[7] *See In re Air Crash Disaster,* 635 F.2d 67, 74-75 (2d Cir.1980); *In re Mexico City Aircrash,* 708 F.2d 400, 407 (9th Cir.1983) (dictum); *Sunbird Air Servs., Inc. v. Beech Aircraft Corp.,* 789 F.Supp. 360, 362 (D.Kan.1992); *Holliday v. Bell Helicopters Textron, Inc.,* 747 F.Supp. 1396, 1398-99 (D.Haw.1990); *In re Air Crash Disaster,* 721 F.Supp. 1185, 1187 (D.Colo.1988);

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[6] *United States v. Varig Airlines,* 467 U.S. 797, 804, 104 S.Ct. 2755, 2760, 81 L.Ed.2d 660 (1984).

[7] Piper has cited several cases finding that Congress intended to occupy the field of pilot safety, thereby precluding enforcement of state laws pertaining to regulation of employee drug use. *See French v. Pan Am Express, Inc.,* 869 F.2d 1 (1st Cir.1989) (drug testing); *Northwest Airlines, Inc. v. Gomez-Bethke,* 34 Fair Empl.Prac.Cas. (BNA) 837, 1984 WL 1040 (D.Minn. Apr. 1, 1984) (employment rights of chemically dependent workers). Although these cases suggest Congress intended uniformity of regulation, they are not persuasive because they address pilot regulation and because they do not involve tort claims that implicate the savings clause of 49 U.S.C.App. § 1506, which shows contrary congressional intent. Similarly, the Supreme Court's decision in *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973), did not involve allegations of defective design of an airplane. It involved a municipality's efforts to regulate airplane noise, which the Court found "remains peculiarly within the competence of FAA, supplemented now by the input of EPA." *Id.* at 640, 93 S.Ct. at 1863.

Brunwasser v. Trans World Airlines, Inc., 541 F.Supp. 1338, 1345-46 (W.D.Pa.1982); *Alaska Airlines, Inc. v. Sweat*, 568 P.2d 916, 927 (Ala.1977); *Elsworth v. Beech Aircraft Corp.*, 37 Cal.3d 540, 208 Cal.Rptr. 874, 691 P.2d 630, 635 (1984), *cert. denied*, 471 U.S. 1110, 105 S.Ct. 2345, 85 L.Ed.2d 861 (1985); *see also Perry v. Mercedes Benz of N. Am., Inc.*, 957 F.2d 1257, 1264 (5th Cir.1992) (the National Traffic and Motor Vehicle Safety Act of 1966's savings clause shows Congress's intent not to occupy the field). We arrived at the same conclusion in dicta in *McCord v. Dixie Aviation Corp.*, 450 F.2d 1129, 1131 (10th Cir.1971).[8] By its very words, the statute leaves in place remedies then existing at common law or by statute. Tort liability for design defects was established in the law of many states by the late 1950s and had been extended to airplane crash cases. *See, e.g., DeVito v. United Air Lines*, 98 F.Supp. 88, 96-97 (E.D.N.Y.1951) (failure to warn); Dix W. Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 Yale L.J. 816, 816, 821 (1962); *see also* Restatement of Torts § 398 (1938) (establishing liability for "chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured"). There is nothing inconsistent with Congress's goal of maximum safety and common law claims.

Last term, the Supreme Court analyzed the Act's savings clause in the context of a challenge to state laws prohibiting deceptive advertising of air fares. In *Morales v. Trans World Airlines, Inc.*, — U.S. —, —, 112 S.Ct. 2031, 2034, 119 L.Ed.2d 157 (1992), the Court stated the presence of the savings clause and, prior to 1978, the absence of an express preemption

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[8] We held in *McCord* that Congress did not intend to create a separate private cause of action contrary to common law by enactment of the Act. 450 F.2d at 1131. We noted, however, that "[t]he Act particularly provides that nothing therein shall in any way abridge or alter the remedies now existing at common law." *Id.* The opinion also observes Congress's power to "preempt state law with respect to liabilities for torts arising out of the operation of airplanes." *Id.*

clause,[9] resulted in the states retaining their traditional regulatory powers in this area.[10] Since Congress has not enacted an express preemption clause governing airplane safety, *Morales* supports our conclusion that the savings clause demonstrates the Federal Aviation Act does not preempt state common law.[11]

A tool of statutory interpretation, *expressio unius est exclusio alterius*, also bolsters this conclusion. In *Cipollone v. Liggett*

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[9] The *Morales* Court held that the preemption provisions of 49 U.S.C.App. § 1305, enacted in 1978 to address rates and routes, expressly preempt the state truth-in-advertising laws. --- U.S. at --- -- ---, 112 S.Ct. at 2040-41.

[10] *But cf. City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 635-40, 93 S.Ct. 1854, 1860-63, 36 L.Ed.2d 547 (1973) (the "pervasive nature of the scheme of federal regulation of aircraft noise" indicates intent to preempt).

[11] We will restrict the effect of a savings clause such as the one here in limited circumstances. For example, in *Morales*, the Court stated a savings clause should be limited if it is superseded by a more specific substantive provision , such as a preemption clause. --- U.S. at ---, 112 S.Ct. at 2037. This Act contains an express preemption provision that "relates to rates, routes or services of any carrier," 49 U.S.C.App. § 1305, and not to tort claims such as these.

In other situations the court has limited a savings clause if it presents "an irreconcilable conflict between the statutory scheme and the persistence of common-law remedies," *Nader v. Allegheny Airlines*, 426 U.S. 290, 299-300, 96 S.Ct. 1978, 1984-1985, 48 L.Ed.2d 643 (1976) (holding no irreconcilable conflict), or if it would "undermine [a] carefully drawn statute," *International Paper Co. v. Ouellette*, 479 U.S. 481, 494, 107 S.Ct. 805, 813, 93 L.Ed.2d 883 (1987). Common law remedies do not interfere with the Act's goal of promoting safety. *See* 49 U.S.C.App. §§ 1302, 1303 (1988); H.R.Rep. No. 2360, 85th Cong., 2d Sess. 1, *reprinted in* 1958 U.S.C.C.A.N. 3741, 3741. The Act further suggests a lack of conflict because it empowers the Secretary of Transportation to establish "[s]uch minimum standards governing the design . . . of aircraft . . . as may be required in the interest of safety." 49 U.S.C.App. § 1421(a)(1).

Group, Inc., --- U.S. ---, ---, 112 S.Ct. 2608, 2618, 120 L.Ed.2d 407 (1992), the Court used this doctrine to hold that implied preemption is generally inapplicable to a federal statute that contains an express preemption provision. The Court stated that "enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted."[12] *Id.*

In the present case, Piper asserts that Cleveland's claims are impliedly preempted by the Federal Aviation Act of 1958, 49 U.S.C.App. §§ 1301 *et seq.*, and corresponding federal regulations. Piper does not maintain that Cleveland's claims are expressly preempted.[13] The Act, however, governs two broad areas of congressional concern and contains an express

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[12] The Court stated:

When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," *Malone v. White Motor Corp.*, 435 U.S. [497] at 505, 98 S.Ct. [1185] at 1190 [55 L.Ed.2d 443 (1978)] "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282, 107 S.Ct. 683, 690, 93 L.Ed.2d 613 (1987) (opinion of Marshall, J.). Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius:* Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted. *Cipollone*, --- U.S. at ---, 112 S.Ct. at 2618.

[13] In *Morales v. Trans World Airlines*, --- U.S. ---, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), the Supreme Court gave a broad reading to the preemptive provision in 42 U.S.C.App. § 1305(a). The Court held that the section's prohibition of state enforcement of any law "relating to rates, routes, or services of any air carrier" preempts state regulation of airline advertising. *Id.* at --- -- ---, 112 S.Ct. at 2040-41. We agree with the parties in this case that even a broad reading of the phrase, "relates to," would not encompass the safety regulations at issue here.

preemption provision governing one of them--rates and routes. 49 U.S.C.App. § 1305(a). Under *Cipollone*, this implies that the other broad area of congressional concern--air safety--is not preempted because it is "beyond [the] reach" of the express preemption provision. *Cipollone*, --- U.S. at ---, 112 S.Ct. at 2618.[14] Although § 1305(a) was not part of the original Act,[15] its inclusion in 1978[16] shows that Congress, like the states and the Civil Aeronautics Board, which at that time enforced portions of the statute, believed the Act lacked general preemptive reach.[17]

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[14] *But see French v. Pan Am Express, Inc.*, 869 F.2d 1, 3 (1st Cir. 1989) (rejecting this argument pre-*Cipollone*). The court in *French* mistakenly relies on *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973), which it states implicitly rejected this argument when it found the Act impliedly preempts application of municipal noise ordinances to air flights. However, the *City of Burbank* opinion is inapplicable because § 1305's preemptive provision was enacted into law five years after the *City of Burbank* decision. *See* Airline Deregulation Act of 1978, Pub.L. No. 95-504, 92 Stat. 1705.

[15] *See* Pub.L. No. 85-726, 72 Stat. 731.

[16] *See* Airline Deregulation Act of 1978, Pub.L. No. 95-504, 92 Stat. 1705; *see also* Civil Aeronautics Board Sunset Act of 1984, Pub.L. No. 98-443, 98 Stat. 1703 (making a minor amendment to the preemption provision of 49 U.S.C.App. § 1305(a)).

[17] The House Report concerning the Airline Deregulation Act of 1978 states its express preemption language "will prevent conflicts and inconsistent regulations" caused by the lack of a specific provision allocating state and federal jurisdiction over air service. H.R.Rep. No. 95-1211, 95th Cong., 2d Sess. 16 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3737, 3752. The Report observed that without such a provision federal and state authorities had required passengers traveling between two cities to pay different fares depending on whether they were flying interstate or intrastate. *Id.*, *reprinted in* 1978 U.S.C.C.A.N. at 2751-52.

The United States, which has filed an amicus brief urging preemption, points us to 49 U.S.C.App. § 1508(a), which it suggests evinces Congress's intent to occupy the field of air safety. That section of the original Act, *see* Pub.L. No. 85-726, 72 Stat. 798, states that the United States has "complete and exclusive national sovereignty in the air space above the United States." The Government suggests that in this section Congress "made clear" that "air commerce is an exclusively federal function." However, § 1508(a) addresses the Congress's intent to keep the United States free from military planes from foreign nations, and not domestic safety concerns. Thus, it is inapplicable.

We conclude that congress has not indicated a "clear and manifest" intent to occupy the field of airplane safety to the exclusion of state common law. To the contrary, it appears through the savings clause that Congress has intended to allow state common law to stand side by side with the system of federal regulations it has developed.

Piper also suggests that the Federal Aviation Act impliedly preempts state tort claims because the federal regulatory framework actually conflicts with state common law duties. Such a conflict will be found if it is "a physical impossibility" to

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It is significant that in passing the 1978 Act, Congress also considered safety concerns. Congress asked the Civil Aeronautics Board to prevent "deterioration in established safety procedures," Pub.L. No. 95-504, § 102, 92 Stat. 1706, directed the Secretary of the Transportation to prepare annual reports on air safety because of Congress's concern that the Act "result in no diminution of the high standard of safety in air transportation attained in the United States," *Id.* § 107(a), 92 Stat. 1709, and required the Secretary of Transportation to promulgate new safety regulations as needed, *id.* § 107(d), 92 Stat. 1710. Not only are none of these requirements inconsistent with state common law duties, but juxtaposed against the simultaneous enactment of express preemption of rates and routes, they show that Congress did not intend to preempt lawsuits over design defects.

comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217-18, 10 L.Ed.2d 248 (1963), or when the state law is an obstacle to accomplishing Congress's full purposes and objectives, *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581, 107 S.Ct. 1419, 1425, 94 L.Ed.2d 577 (1987) (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)). In particular, Piper focuses on Cleveland's claims that the plane's design was defective because it leaves a rear-seat pilot with poor forward visibility and because the rear seats lack shoulder harnesses. We find that is not impossible to meet both state common law standards and the federal regulations.

Piper maintains that Cleveland's claims are an attack on the tailwheel design, which is approved by the FAA. *See* 14 C.F.R. pt. 25 app. A. However, the federal regulations Piper has cited require only that the plane be designed "so that . . . [t]he pilot's view is sufficiently extensive, clear, and undistorted, for safe operation." 14 C.F.R. § 23.773(a)(1). The regulations do not require the precise design that Piper has utilized. As the district court noted, Cleveland has presented evidence that Piper could have improved visibility without altering the tailwheel design simply by raising the rear pilot seat. Thus, there is no irreconcilable conflict.

Piper also asserts that it fully complied with the seat belt requirements because the regulations in place when the FAA approved its design of the plane did not require shoulder harnesses. It asserts that the FAA did not make later requirements retroactive. This, however, is not an argument for preemption since it would have been possible to install a shoulder harness on the rear pilot's seat without conflicting with the federal regulations.

Furthermore, as noted previously, the Federal Aviation Act authorizes promulgation of "minimum standards." 49 U.S.C.App. § 1421. By themselves, minimum standards such as these are not conclusive of Congress's preemptive intent. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 n. 19, 98 S.Ct.

988, 1000 n. 19, 55 L.Ed.2d 179 (1978). However, minimum standards may be evidence of such intent. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 147-48, 83 S.Ct. 1210, 1219-20, 10 L.Ed.2d 248 (1963). The district court determined that by designating the standards as minimum, Congress indicated that it did not want to bar states from adopting additional or more stringent standards. *See also Holliday v. Bell Helicopters Textron, Inc.,* 747 F.Supp. 1396, 1400-01 (D.Haw.1990); *Perry v. Mercedes Benz of North America, Inc.,* 957 F.2d 1257, 1264-65 (5th Cir.1992) ("minimum standard" requirement for automobiles). This is consistent with the Act's purpose of promoting safety. 49 U.S.C.App. §§ 1302, 1303; H.R.Rep. No. 2360, 85th Cong., 2d Sess. 1, *reprinted in* 1958 U.S.C.C.A.N. 3741, 3741. The United States, however, suggests an alternative interpretation. It urges that rather than giving states the option to heighten standards, the "minimum standards" limitation allows manufacturers to improve safety beyond that which the federal government requires. This, too, would be consistent with the Act's purposes. While we are skeptical that Congress was concerned that administrative agencies and manufacturers would otherwise feel constrained to improve the safety of products, we need not resolve this ambiguity. In determining congressional intent on preemption questions, we look for "clear and manifest" indicators. *English v. General Elec. Co.,* 496 U.S. 72, 79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990). We find none here.

Piper also suggests that Cleveland's claims are preempted because the FAA and its predecessor agencies approved the airplane's design. However, FAA approval is not intended to be the last word on safety. The FAA has given manufacturers broad responsibilities for assuring their own compliance by appointing aircraft company employees to "act as surrogates of the FAA in examining, inspecting, and testing aircraft for purposes of certification." *United States v. Varig Airlines,* 467 U.S. 797, 807, 104 S.Ct. 2755, 2761, 81 L.Ed.2d 660 (1984). The *Varig* Court said:

> The FAA certification process is founded upon a relatively simple notion: the duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer and operator, while the FAA retains the responsibility for policing compliance. Thus, the manufacturer is required to develop the plans and specifications and perform the inspections and tests necessary to establish that an aircraft design comports with the applicable regulations; the FAA then reviews the data for conformity purposes by conducting a "spot check" of the manufacturer's work.

Id. at 816-17, 104 S.Ct. at 2766 (footnote omitted). Thus, FAA certification is, by its very nature, a minimum check on safety.

Piper also asserts that we should be guided by a line of cases holding that the National Traffic and Motor Vehicle Safety Act (NTMVSA), 15 U.S.C. §§ 1381 *et seq.*, and corresponding regulations, preempt state tort claims for failure to install air bags. The regulations give automobile manufacturers a choice of equipping cars with any of three types of passenger restraints, including air bags. 49 C.F.R. § 571.208 (Safety Standard 208).[18] *See Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir.1989), *cert. denied,* 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 783 (1990); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied,* — U.S. —, 111 S.Ct. 147, 112 L.Ed.2d 113 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir.1989), *cert. denied,* 494 U.S. 1065, 110 S.Ct.

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[18] Piper points us to a district court decision dismissing a claim against an airplane manufacturer. The dismissal was based on implied preemption grounds and cites *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied,* 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 782 (1990). *Dee v. Lake Aircraft, Inc.*, No. 88-0290-CIV-Kettoe (S.D.Fla. March 12, 1991). The *Dee* court does not provide its reasoning nor explain the issues in the case. Thus, we cannot determine if the decision should provide us any guidance. An appeal of the decision is now pending in the Eleventh Circuit Court of Appeals.

1781, 108 L.Ed.2d 783 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir.1988), *cert. denied,* 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 782 (1990). *But see Perry v. Mercedes Benz of N. Am., Inc.,* 957 F.2d 1257 (5th Cir.1992) (no preemption for installation of defective air bags). These cases determine that "a state common law rule that would, in effect, remove the element of choice authorized in Safety Standard 208 would frustrate the federal regulatory scheme." *Taylor,* 875 F.2d at 827. Thus, they hold that "[a]llowing a common law action holding manufacturers liable for failing to install air bags in motor vehicles would be tantamount to establishing a conflicting safety standard that necessarily encroaches upon the goal of uniformity specifically set forth by Congress in this area." *Kitts,* 875 F.2d at 789 (quoting *Wood,* 865 F.2d at 402).

The regulations at issue here are different than those in the air bag cases. As noted previously, the requirements cited by Piper do not specify how a manufacturer must ensure visibility. 14 C.F.R. § 23.773(a)(1). Further, as Piper states, there were no requirements in place on rear seat shoulder harnesses when the FAA certified its approval of the Piper Super Cub.[19] Thus,

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[19] A closer question is presented by regulations promulgated in 1969 to require manufacturers to choose one of three safety options, one of which utilized shoulder harnesses. *See* 14 C.F.R. § 23.785(g) (1970). Cleveland argues that Piper did not comply with any of the three options. However, as Piper states, these regulations apply only to planes receiving "type certificates" from the FAA beginning on September 14, 1969. 34 Fed.Reg. 13078, 13086 (1969). Since Piper received authority to build the Piper Cub years earlier, the 1969 amendments are irrelevant to our analysis. The fact that the FAA decided against making later amendments retroactive does not bring this case within the teachings of the air bag decisions. Piper's reasoning would suggest that anytime the government chooses not to regulate a field and leaves safety requirements to manufacturers, state court review of a manufacturer's choices would be preempted. Such reasoning stretches preemption doctrine beyond its bounds.

the air bag cases Piper relies on are not applicable to the claims asserted here.

In addition, while there are, without question, similarities between the NTMVSA and the Federal Aviation Act, there are also key differences. Like the Act in question here, the NTMVSA contains a savings clause preserving state tort remedies. 15 U.S.C. § 1397(k). Similarly, the NTMVSA authorizes the regulatory agency to issue only minimum standards. *Id.* § 1391(2). However, unlike the Federal Aviation Act, the NTMVSA contains an express preemption provision governing safety. This provision forbids any state-established "safety standard . . . which is not identical to the Federal standard." 15 U.S.C. § 1392(d). Thus, in the automobile air bag cases, the courts were faced with the task of deciphering congressional intent when the lawmakers have expressly preempted state regulation but not common law liability. *See, e.g., Wood,* 865 F.2d at 401. In this case, however, the Federal Aviation Act contains no express preemption provision governing safety. *See Holliday v. Bell Helicopters Textron, Inc,* 747 F.Supp. 1396, 1400 & nn. 2-3 (D.Haw.1990) (distinguishing the Federal Aviation Act and the National Traffic and Motor Vehicle Safety Act).

Furthermore, when the court recently applied the doctrine of *expressio unius est exclusio alterius* to preemption cases, it excluded consideration of all forms of implied preemption, including conflict preemption. *Cipollone,* --- U.S. at ---, 112 S.Ct. at 2618. Justice Blackmun's concurring opinion made this explicit. *Id.* at ---, 112 S.Ct. at 2625 ("We resort to principles of implied pre-emption--that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law *or whether state law actually conflicts with federal law*--only when Congress has been silent with respect to pre-emption.") (citation omitted, emphasis added); *see also id.* at ---, 112 S.Ct. at 2633 (Scalia, J., dissenting) (asserting that this aspect of the decision "works mischief"). Congress's inclusion of § 1305(a) preempting state regulation of air rates and routes suggests that it intended the Federal Aviation Act not to preempt common law

claims such as those set forth in this suit.[20] *See Holliday,* 747 F.Supp. at 1400 n. 3 (pre-*Cipollone* analysis).

Thus, we agree with the district court that Cleveland's claims are not preempted by federal law.[21]

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[20] As Justice Scalia's dissent points out, a blanket proscription creates difficulties for cases in which state and federal law actually conflict, making it impossible to satisfy both standards. *Cipollone,* --- U.S. at ---, 112 S.Ct. at 2633. In earlier cases, when the Court determined that it was impossible to meet both the state and federal regulations, it turned to the Supremacy Clause to determine that the federal regulations impliedly preempt the state regulations. *See, e.g., M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819). Abandoning this position seems incongruous to say the least. We need not resolve this incongruity here, however, because there is no actual conflict between the regulations and state tort remedies. Other circuits, however, have determined "whenever Congress includes an express preemption clause in a statute, judges ought to limit themselves to the preemptive reach of that provision with essaying further analysis *under the various theories* of implied preemption." *Greenwood Trust Co. v. Massachusetts,* 971 F.2d 818, 823 (1st Cir.1992) (emphasis added), *cert. denied,* --- U.S. ---, 113 S.Ct. 974, 122 L.Ed.2d 129 (1993); *see also American Agric. Movement v. Board of Trade,* 977 F.2d 1147, 1154 (7th Cir. 1992) ("Only if a statute is devoid of explicit preemptive language may we resort to either variant of implied preemption.").

[21] Piper also moved for summary judgment on the basis that Cleveland's claims should be dismissed because New Mexico has legislatively adopted certain federal aviation rules. *See* N.M.Stat.Ann. § 64-1-2 (1978 Comp.). The district court denied summary judgment and we agree. Not only does this statute not address tort claims, but to the extent the federal law allows tort claims to proceed, so too does the state law.

III. LIMITATIONS ON THE NEW TRIAL

A. DAMAGES

The district court made two rulings limiting the scope of the second trial which the defendant attacks as beyond the mandate of this court's initial opinion. The judge stayed both rulings to give this court an opportunity to review them under 28 U.S.C. § 1292(b).[22]

The first disputed ruling concerns the district court's decision to accept the original jury's verdict on the amount of damages, foregoing retrial of this issue. Rather, the new trial would concern only questions of liability and apportionment of negligence. Piper argues that this ruling is contrary to this court's previous mandate. In our earlier opinion, we observed that in the new trial:

> [T]he special verdict form should permit the jury to determine which of the parties and non-parties (whether "original tortfeasors" or "crashworthiness tortfeasors") were negligent; whether the negligence of each of such parties and non-parties was a proximate cause of Plaintiff's injury and damages; *the amount of damages sustained by the Plaintiff;* and to compare the negligence of each party and non-party (whether "original tortfeasors" or "crashworthiness tortfeasors") found to be the proximate cause of the Plaintiff's injuries and damages.

Cleveland, 890 F.2d at 1557 (emphasis added).

The district court interpreted the phrase "the amount of damages sustained by the Plaintiff" to be limited to the apportionment of damages, since this was the central focus of

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[22] The plaintiff claims that this court does not have jurisdiction over this part of the appeal because application to take an interlocutory appeal was not made within the required ten-days provided in 28 U.S.C. § 1292. We have considered this argument and find it without merit.

our discussion about the deficiency of the special verdict form. Piper now urges that this interpretation is contrary to our mandate. The plaintiff on the other hand urges that no issues of damages remain, and that it is more logical and efficient to limit the second trial to apportionment questions since the amount of damages has been adjudicated in the first trial.

In our earlier opinion we granted a new trial as to *both* liability and damages. Our original opinion contemplated a recomputation of the damage amount as well as the apportionment of the award.

This court found the deficiency of the special verdict to be as follows:

> [T]he trial court should have permitted the jury to determine whether the negligence of original tortfeasors was a proximate cause of Plaintiff's enhanced injuries, and to compare the negligence of any original tortfeasors found to be a proximate cause of the enhanced injuries to the negligence of any crashworthiness tortfeasors and of the Plaintiff which was found to have proximately caused Plaintiff's enhanced injuries. The special verdict form was erroneous and contrary to New Mexico law because it did not permit the jury to do so. As we have already indicated, our remand of this case to the district court for a new trial is necessary on this basis.

Cleveland, 890 F.2d at 1556.

The district court's interpretation overlooks this court's earlier observation that a second jury may in fact find that the plaintiff's injuries are partially or wholly attributable to the original collision. *Clevelañd,* 890 F.2d at 1550. In our earlier opinion, we discussed that under New Mexico law, the crashworthiness tortfeasors could not be concurrent tortfeasors with the original collision tortfeasors as to injuries received in the original collision,[23] but both groups of tortfeasors could be

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[23] As our earlier opinion explained, even though the original

concurrent tortfeasors as to the second (or crashworthiness) collision. *Id.* at 1549-50. Thus, this court concluded that the special verdict form did not allow for an apportionment of fault of the original tortfeasors as required by New Mexico law.

Having explained the above described deficiency, our earlier opinion recognized that although the original verdict found that the crashworthiness negligence (lack of the shoulder harness) caused 100% of Cleveland's injuries, a different finding might be made in the second trial. If this occurred, *the damages* would have to be apportioned between those injuries resulting solely from the original collision and those incurred by reason of the lack of the shoulder harness. This apportionment cannot be determined solely by percentages since the crashworthiness tortfeasors could not have caused any of the injuries from the original collision. This follows because the latter are not deemed concurrent tortfeasors in the original collision under New Mexico law.

Thus, we hold that the trial court erred in finding that a new trial was not required as to the overall amount of damages.

B. WITNESSES

The second disputed ruling concerns the district court's order that the new trial be limited to the same witnesses and exhibits as produced in the original trial. Piper urges this ruling is error and not contemplated by our prior opinion.

The district court has broad discretion in its control and management of trials. This discretion extends on remand to all areas not covered by the higher court's mandate. *See Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 168, 59 S.Ct. 777, 780, 83 L.Ed. 1184 (1939); *United States v. Iriarte,* 166 F.2d 800, 803

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tortfeasors may be concurrent tortfeasors in contributing to the enhanced injuries, under New Mexico law comparative negligence law, the fault or negligence of *all* concurrent tortfeasors must be apportioned. *See Cleveland,* 890 F.2d at 1550 (citing *Bartlett v. New Mexico Welding Supply, Inc.,* 98 N.M. 152, 646 P.2d 579, 585 (Ct.App.), *cert. denied,* 98 N.M. 336, 648 P.2d 794 (1982)).

(1st Cir.), *cert. denied,* 335 U.S. 816, 69 S.Ct. 36, 93 L.Ed. 371 (1948). The Federal Rules of Civil Procedure require that all actions be disposed of in a fair and expeditious manner. *See* Fed.R.Civ.P. 1. Trial judges exercise broad discretion in limiting issues to be tried, evidence to be used (such as by avoiding cumulative and collateral proof), the time for oral argument, and the number of witnesses and experts who can be produced. Pretrial procedures are designed to manage trials, schedule and make expeditious discovery procedures, formulate issues, and provide fair notice of witnesses and proof to be adduced by all parties to litigation.

Notwithstanding the recognition of the trial court's broad discretionary authority over such issues, its rulings nevertheless must be balanced with constitutional fairness so as not to prejudice the basic rights of the parties.

In the present case, Piper wishes to produce new witnesses (all but one of whom is an expert witness), exhibits, and regulations at the new trial.[24] The district court denied use of all new witnesses and evidence. It found that this limitation was

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[24] Piper wishes to produce the following witnesses: (1) Herbert M. Toomey, the former chief of the Aircraft Engineering Division of the Civil Aeronautics Administration (CAA) for the Eastern Region, to explain certain correspondence of the CAA to Piper which was received in evidence at the first trial; (2) Richard Chandler, the former manager of the Protection and Survival Laboratory of the FAA's Civil Aeromedical Institute, to discuss the development process of the shoulder harness; (3) Les Hudson, to testify about the purpose of the acquisition of the Super Cub involved in the accident; (4) Samuel Hayden, the former head of the Aircraft Modification Section of the FAA for the Eastern Region, to testify Cleveland violated federal aviation regulations by altering the airplane; (5) Bret Willat, who owns and operates a sailplane operation which utilizes a Super Cub, to testify about tow operations and to show a video he produced; and (6) J.T. Hayes, a New Mexico State police officer, to describe his investigation of the accident. Piper also wishes to introduce additional evidence depicting "the long and safe history of the thousands of Super Cubs . . . with the same basic design and visibility characteristics."

in harmony with the court's earlier opinion. However, the trial court also found such a limitation did not mean that the second trial will necessarily duplicate the first.

We note that the accident occurred on July 8, 1983. The original pretrial order was filed on February 10, 1986. The parties had ample time for discovery and investigation. Our remand for a new trial was not an invitation to reopen discovery for newly retained expert witnesses and to enlarge trial time unnecessarily through the addition of totally new exhibits and testimony. It is always easy in hindsight for counsel to realize there may be a better way to try a case the second time around. Hindsight advantage necessarily inures to both sides, but this does not mean a court, when faced with procedural error, *must* allow either side to introduce totally new expert witnesses to bolster or impeach earlier evidence.

Piper can further develop many of its theories and defenses through its earlier trial witnesses. The trial court undoubtedly resolved that much of Piper's new evidence would be cumulative and redundant of that which was produced before. It appears to this court that much of the proffered evidence constitutes a lawyer's theory of how to "plug the holes" of a case. Allowing Piper to use the newly discovered evidence would require extensive additional discovery. This court must defer to the trial court's balancing of the value of additional evidence with the need for judicial economy and the reasons that the case was remanded in the first place. As the Fifth Circuit has noted in a different context, pretrial procedures can achieve the purpose

> of improving the quality of justice only if the pretrial requirements entered at the discretion of the trial court are applied with intelligent flexibility, taking into full consideration the exigencies of each situation. The trial judge must be permitted wide latitude in guiding a case through its preparatory stages. His decision as to the extent that pretrial activity should prevent the introduction of otherwise competent and relevant testimony at trial must not be disturbed unless it is

> demonstrated that he has clearly abused the broad discretion vested in him by Rule 16.

Davis v. Duplantis, 448 F.2d 918, 921 (5th Cir.1971).

We find the same principles should govern the trial court's discretion in managing a second new trial in any given case. The trial court is much more familiar with the conduct of the original trial, the needs for judicial management and the requirements of basic fairness to the parties in a new trial. We do not feel, however, that the trial court's ruling should be inflexible. Clearly, if the trial court perceives in limiting evidentiary proof in a new trial, a manifest injustice, to one side or the other,[25] the court must retain broad latitude and may with proper notice allow additional witnesses and relevant proof. In this regard, if a party makes a timely motion to produce new and material evidence which was not otherwise readily accessible or known, the court should, within the exercise of discretion, consider whether denial of the new evidence would create a manifest injustice. If a lay or expert witness is deceased or ill or for whatever reason unable to attend trial, the court should give every consideration to allowing additional witnesses to testify. This does not mean the court should allow cumulative evidence, but it does mean that the court should allow sufficient leeway for the parties to produce new evidence, without undue prejudice to their interest. Technical rulings should never preclude new and material proofs; common sense should control. In conclusion, we remand to the trial court the issue concerning Piper's motion to adduce new witnesses and new evidence; the court in accord with the principles set forth here may in the exercise of discretion, reaffirm or modify its original ruling.

In conclusion, we affirm the denial of Piper's motion for summary judgment on the grounds of federal preemption. We remand for reconsideration the trial court's denial of the use of all new expert witnesses and exhibits with the understanding that parties may move for the admission of new evidence and use of

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[25] *See* Fed.R.Civ.P. 16.

new witnesses upon a showing of manifest injustice in the denial of their use. We reverse the court's order that limits the verdict only to liability issues.[26]

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[26] The plaintiff has cross appealed the trial court's refusal to grant summary judgment on the issue of liability. Such a ruling would contradict this court's earlier opinion. In addition, it is not among the issues properly certified by the trial court under 28 U.S.C. § 1292(b).

2. Order of the Court of Appeals, *Cleveland v. Piper Aircraft Corp.*, No. 91-2065 (April 5, 1993)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EDWARD CHARLES CLEVELAND, by and through the Conservator of his Estate KATHLEEN CLEVELAND, Individually,

Plaintiff - Appellee,

v.

PIPER AIRCRAFT CORPORATION, a corporation,

Defendant - Appellant,

ASSOCIATION OF TRIAL LAWYERS OF AMERICA,

and

AVIATION MANUFACTURERS ASSOCIATION, AIRCRAFT OWNERS AND PILOTS ASSOCIATION (AOPA), UNITED STATES OF AMERICA,

Amici Curiae.

No. 91-2065

ORDER

Entered April 5, 1993

Before McKAY, Chief Judge, LAY*, and BARRETT, Senior Circuit Judges, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges.

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*Honorable Donald P. Lay, Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

3. Memorandum Opinion and Order of the United States District Court for the District of New Mexico, *Cleveland v. Piper Aircraft Corp.*, No. 85-0062-M (Feb. 12, 1991)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

EDWARD CHARLES CLEVELAND, by and through the Conservator of his Estate Kathleen Cleveland, and KATHLEEN CLEVELAND, individually,	)	
Plaintiffs,	)	No. 85-0062-M Civil
v.	)	
PIPER AIRCRAFT CORPORATION, a corporation,	)	
Defendant.	)	

MEMORANDUM OPINION
AND
ORDER

This matter came on for consideration on defendant's motion for summary judgment on the basis of preemption. Having considered the motion, the response, and reply, and being otherwise fully advised in the premises, I find that the motion is not well taken and it is denied.

Further, I find that this motion involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation. *See* 28 U.S.C. § 1292.

Background

This case is a diversity action. Plaintiff, Edward Charles Cleveland claims liability against defendant Piper Aircraft Corporation on a theory of design negligence concerning an

accident on July 7, 1983. Cleveland was injured when the Piper Super Cub Model PA-18-150 that he was piloting collided with a van parked across an airport runway. At trial, plaintiff promoted two theories of negligence, (1) inadequate forward visibility during takeoff from the rear pilot seat, and (2) lack of shoulder harness for the rear pilot's seat.

On May 9, 1986, the jury returned a verdict in favor of Cleveland. Plaintiff appealed the award arguing that it was inconsistent with the answers to the special verdict form. Piper cross-appealed arguing that this court erroneously employed jury instructions which did not permit the jury to compare the negligence with all possible tort feasors proximately causing Cleveland's injuries.

The Tenth Circuit Court of Appeals agreed that the jury instructions did not comply with New Mexico law and, therefore, vacated the judgment and remanded the case to this court for a new trial.

Discussion

Piper now argues for the first time in its motion for summary judgment that Cleveland's claims for compensatory damages are preempted by federal law. Specifically, Piper maintains that plaintiff's design negligence claims are preempted by the pervasiveness of the Federal Aviation Act's (FAA) federal regulatory scheme. Piper also claims the FAA mandated certification scheme for aircraft design and safety would conflict with a jury's finding for plaintiff, Cleveland. Piper views this as an action which could potentially result in a jury determination of different design and performance standards. Piper argues that the trier of fact would have no greater right than a state legislature would in establishing a different standards.

Cleveland views his action as one involving recovery of compensatory damages for a negligence claim. He argues that the purpose of this action is not to interfere with regulation or certification of aircraft.

I. Summary Judgment

A motion for summary judgment may be granted when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. For the purpose of opposing Piper's motion, Cleveland filed a motion to strike defendant's attached affidavits arguing that they are not based on personal knowledge and are not admissible under the Federal Rules of Evidence. *See* Fed.R.Civ.P. 56(e). Cleveland also objects to Piper's statement of undisputed facts set forth in its memorandum. Cleveland has made no effort to respond to the content of the factual allegations, and requests that I deny the motion on technical grounds because of the deficiency in the affidavits. I decline to deny defendant's motion on these grounds because the question Piper raises is essentially a legal one. Therefore, I do not rule on the question of whether the affidavits attached to Piper's motion for summary judgment meet the requirement of Fed.R.Civ.P. 56(e). Further, I note that Piper's statement of undisputed facts contains many references to documents for which legal citations are included. These citations with accompanying interpretations are not factual, but would more properly have been included as legal background.

II. Preemption

The Supremacy Clause of Article VI of the Constitution grants Congress the power to preempt state law. *Louisiana Public Service Com. v. FCC*, 476 U.S. 355, 368 (1986). Preemption may either be express or implied. *See Shaw v. Delta Air Lines*, 463 U.S. 85, 95 (1983). Express preemption does not apply here. The question of whether the FAA and accompanying regulatory scheme impliedly preempts Cleveland's claims for tort damages is necessarily one of Congressional intent. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1987). Preemption is shown by Congressional intent to occupy a particular field. Courts infer such intent where the federal scheme is so pervasive that it precludes supplementation by the states or where federal interest in the field is sufficiently dominant. *Id.* at 300. Further, the Supreme Court in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) held that:

> [i]f Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, (citation omitted) that is when it is impossible to comply with both state and federal law (citation omitted) or where the state law stands as an obstacle to the accomplishment to the full purposes and objectives of Congress . . . .

Id. at 248.

Piper argues that the FAA impliedly preempts this action both because of the pervasiveness of the federal regulatory scheme and because Cleveland's claims conflict with federal law. Piper argues that the FAA and the regulations promulgated pursuant to it, leave no room for state involvement with design and performance standards for general aviation aircraft. It maintains that the federal regulations set forth an all encompassing scheme for the design, certification, production, and manufacture of the aircraft. Piper argues that because state legislatures would be prevented from passing statutes concerning such design and performance standards, so too triers of fact could not apply state law to determine different design and performance standards. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

A. Pervasive Scheme Preemption

Unquestionably, the regulation of aviation safety has long been an area of federal interest and regulation. The Air Commerce Act of 1926, Pub.L. No. 69-254, 44 Stat. 568. The Air Commerce Act of 1926 set forth safety regulations and gave the federal government control over operation of the airways. *Id.*; H. Wolfe & D. New Meyer, *Aviation Industry Regulation* 22 (1985). Under the Civil Aeronautics Act of 1938, the Civil Aeronautics Board was established which was responsible for safety standards for aircraft. *Id.* at 25. Regulations promulgated by the Board were known as Civil Air Regulations or CAR's. *Id.* at 26; 88 Stat. 2156. The Federal Aviation Act of 1958 established the Federal Aviation Agency and expanded

the federal government's role in air safety. The safety regulations issued by the agency were known as Federal Aviation Regulations or FAR's. *Id.* at 27.

Notwithstanding the obvious importance which Congress places in federal regulation of air safety and aircraft design, preemption is not warranted. I agree with Piper that an award of compensatory damages can be a method of regulating safety. *See Bieneman v. Chicago*, 864 F.2d 463, 472 (7th Cir. 1988). Nonetheless, neither this fact nor congressional interest in air safety necessarily lead to the conclusion that Congress intended to preempt the area of common law remedies for state design negligence claims.

In *Silkwood*, the Supreme Court made clear that although federal law occupied the field of nuclear safety regulation, the Atomic Energy Act did not go so far as to preclude a damage award. *Silkwood*, *supra* at 249. Likewise, in this case, the FAA's regulatory scheme for aircraft design and safety does not extend to ruling out a state common law remedy. Piper argues that a comparison with *Silkwood* is not applicable here because unlike this case, the jury in *Silkwood* found a violation of federal standards. The issue of whether Piper violated any federal standard here appears to be an unresolved question of fact.

When an aircraft complies with the applicable safety and design standards, the Federal Aviation Agency issues it a certificate of compliance 49 U.S.C. 1423; *Aviation Industry Regulation* 39. Defendant contends that no issue of fact exists on the question of whether the agency issued a certificate of compliance for this aircraft. Because plaintiff disputes the form of defendant's attached affidavit and not the content, it is unclear whether this point is an issue of fact or not.

Defendant's contention that Piper fully complied with federal aviation regulations and was issued a certification of compliance is supported by plaintiff's proposed exhibit list No. 12 for the first trial which includes an FAA-type certificate No. PA-18-150. Plaintiff appears to admit the existence of such a certificate on page 19 of his response memorandum. Further, an

aircraft cannot be produced or sold without a type certification. *Aviation Industry Regulation* 39.

At this stage in the proceedings, any difference between this case and *Silkwood* cannot be determinative. However, even if no question exists that Piper complied with the federal design regulations for visibility and crash worthiness, Piper's attempt to distinguish *Silkwood* fails. The focus of the *Silkwood* opinion is on the question whether Congress *intended* to extend its reach and thus "displace[] state regulations over the matter in question." *Silkwood*, *supra* at 249. Likewise, for the following reasons, I find no such intent in the Federal Aviation Act.

The FAA contains a savings clause which precludes finding Congressional intent to occupy the field of tort liability. *Holliday v. Bell Helicopters Textron, Inc.*, 747 F.Supp. 1396 (D.Hawaii 1990) (where the court held that plaintiff's crash worthiness claims were not preempted by the Federal Aviation Act.) The savings clause provides: "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing in common law or by statute but the provisions of this chapter are in addition to such remedies." 49 U.S.C. App. § 1506 (App. 1982).

In *McCord v. Dixie Aviation Corp.*, 450 F.2d 1129 (10th Cir. 1971), the Tenth Circuit Court of Appeals specifically relied upon the savings clause when it stated "that Congress had no intention of providing for tort liability in the enactment of the Federal Aviation Program." *Id.* at 1131. The court of appeals noted that Congress had the power, under the Commerce Clause, to preempt state common law liability and provide remedies for tort damages, but declined to do so. *Id.* at 1131. Thus, the FAA complements but does not supplant existing statutory and common law remedies. *Holliday*, *supra* at 1399.

Piper argues that the savings clause is inapplicable here. Citing *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981), Piper argues that such savings clauses are included merely to explain that an act was not intended to deprive state courts of jurisdiction. *Id.* at 325.

In *Kalo Brick*, the Supreme Court disallowed resort to common law remedies based upon a similarly worded savings clause because the Iowa statute in question and the common law causes of action directly conflicted with the Interstate Commerce Act. The act also specifically provided an administrative remedy for an aggrieved party. *Id.* at 324. Nothing in *Kalo Brick* detracts from the plain meaning of this savings clause.

I also find no merit in Piper's argument that my reading of the savings clause cannot be reconciled with the express language of 29 U.S.C. § 1421(a) which grants the administrator power to set standards related to aircraft design and safety. *See Stafford v. Briggs*, 444 U.S. 535 (1979). Even though damage awards can operate to regulate safety, *see Bieneman*, *supra* at 472, there still need not be a conflict with § 1421(a) which merely grants the administration the authority to promulgate "minimum standards."

Further, because the FAA contains the "minimum standards" wording, its savings clause cannot be meaningfully compared with the savings clause in the Motor Vehicle Safety Act (MVSA), 15 U.S.C. § 1397(c), as Piper contends. The MVSA contains a conflicting provision specifically forbidding states from establishing safety standards which are not identical to the federal standards. 15 U.S.C. 1392(d). Thus, the cases Piper cites holding that the MVSA preempts common law products liability claims do not take away from the plain meaning of the savings clause in the FAA. *See, e.g., Cox v. Baltimore County*, 646 F.Supp. 761, 764 (D.Md. 1986).

The numerous cases which Piper cites holding that FAA preempts state law deal with specific matters which the act controls and, therefore, are not pertinent here. *See, e.g., Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (where the Supreme Court held the scheme of federal regulation concerning aircraft noise was so pervasive that a local noise ordinance was preempted); *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir. 1989) (where the court held that the state law claim relating to the exclusion of a passenger was preempted because of the express wording of a preemption provision of the

act); *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989) (where the court held that the FAA contained a pervasive scheme for regulating and certifying pilots which specifically conflicted with Rhode Island law concerning drug testing.)

Therefore, because of the plain meaning of the savings clause, and the fact that the act provides no indication that Congress intended to occupy the field with respect to tort liability, this claim cannot be preempted on the basis of pervasive scheme.

B. Conflict Preemption

Implied preemption may also exist when state law conflicts with federal law even where Congress has not entirely displaced state regulation in a particular field. *Schneidewind*, *supra* at 300. Piper contends that Cleveland's forward visibility and shoulder harness claims conflict with federal law. It argues that Cleveland's claims should be preempted to prevent a jury from adopting higher design standards. To determine whether conflict preemption exists, I assume, but do not decide, that the Super Cub met with pertinent standards. Conflict preemption exists when it is "impossible to comply with both state and federal law," or where state law stands in the way of accomplishing the purposes of Congress. *Silkwood*, *supra* at 248.

As for forward visibility, Piper argues that Cleveland's claim is an attack on the tail wheel design. Piper maintains that a jury decision in Cleveland's favor would render meaningless FAA regulations relating to tail wheel design. Federal law sets forth "such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft . . . as may be required in the interest of safety." 49 U.S.C.App. § 1421(a)(1). Piper does not explain how specific regulations it cites conflict with Cleveland's claim of design negligence. After reviewing the regulations specified by Piper, I find no conflict. *See* C.A.R. §§ 3.106, 3.245, 3.244 (and Figures 3.12a and 3.12b), 3.246, 3.250, 3.251, 3.252, 3.351, 3.352, 3.353, 3.354, 3.355, 3.381, and 3.382. Section 3.382 specifically deals with visibility: "The pilot compartment shall be arranged to afford

the pilot a sufficiently extensive clear and undistorted view for the safe operation of the aircraft . . . ." Thus, even if a jury should find a more stringent standard for visibility, it would not be impossible to comply with the minimum federal standards or Congressional purpose.

Second, Piper states that the federal regulations grant aircraft manufacturers the option of using either the tail wheel or nose wheel design. An aircraft with a tail wing [sic] design sits at an angle with resulting effects on visibility. 14 C.F.R. Pt. 25 App. A. Piper argues that a jury finding of negligent design on visibility would eliminate the tail wheel option. Thus, Piper maintains that such a finding would interfere with the exercise of a federally granted option necessitating preemption.

In *Taylor v. General Motors Corp.*, 875 F.2d 816, 827 (11th Cir. 1989), the court held that a products liability action was preempted because it interfered with a federally granted option. Here, however, an issue of fact exists as to whether a finding of design negligence necessarily means ruling out the tail wheel design. For example, in deposition testimony, attached as an exhibit to Cleveland's memorandum, the deponent mentions raising the rear seat to improve pilot visibility. This statement implies that other aspects of design could be considered in a determination of negligence. Therefore, because the facts are not sufficiently developed to determine the question, summary judgment is not appropriate on the basis of this argument.

Next, Piper argues that Cleveland's design negligence claim based on a lack of a shoulder harness conflicts with federal law. The question here is whether a jury's finding of design negligence would stand in the way of compliance with the federal standard. Piper states that regulations requiring shoulder harnesses in all seats were applicable to aircraft manufactured after December 12, 1986 and, therefore, this rule was not made retroactive or applicable to the Super Cub. *See* 50 Fed. Reg. 46872-01, Amendment 23-32 (Nov. 13, 1985). Piper appears to mean that a jury finding for Cleveland would make the regulations retroactive and in this way conflict with federal law. As explained above, the safety regulations promulgated pursuant

to the FAA set forth "minimum standards." 59 U.S.C.App. § 1412(a)(1). "[N]othing in the FAA indicates that states may not require aircraft to be *more* safe or *better* designed. In addition, compliance with more stringent safety standards established by state products liability law would not prevent defendant from complying with federal regulations that set lower standards." *Holliday*, *supra* at 1401. Thus, the fact that federal regulations did not require shoulder harnesses for the aircraft in this case does not necessarily mean a jury finding for plaintiff should be preempted.

Piper's attempt to distinguish *Holliday v. Bell* is not persuasive. In *Holliday*, Piper explains, the Court indicated that the defect did not become evident until an after-crash investigation. Piper then states that the Super Cub possessed no unknown defects except for obvious limited forward visibility and the missing shoulder harness. Defendant fails to explain how this distinction makes any difference. Nonetheless, Piper's argument again shows the existence of issues of fact.

Therefore, conflict preemption does not exist as to Cleveland's design negligence claims. For all the reasons explained above, I deny Piper's motion for summary judgment based on preemption.

III. State Law

Last, Piper argues that Cleveland's claim should be dismissed because New Mexico has adopted the federal standards for aircraft design, construction, and air worthiness. *See* N.M.Stat.Ann. 64-1-1 *et seq.* (1978 Comp.) and *Security Mut. Casualty Co. v. O'Brien*, 99 N.M. 638, 641, 662 P.2d 639, 642 (1983). The "minimum standards" provision would be just as pertinent to state law as it is to the federal preemption argument. *See* § 1421(a)(1). Further, a finding of no Congressional intent to occupy the field redressing claims for design negligence could hardly preclude a New Mexico court from addressing such

claims in common law negligence actions. Thus, I see no reason to dismiss plaintiff's claim based on state law.

IT IS SO ORDERED.

/s/ E. L. Mechem
E. L. MECHEM
SENIOR UNITED STATES DISTRICT JUDGE

4. Order of the Court of Appeals, *Piper Aircraft Corp. v. Cleveland*, No. 91-543 (Mar. 14, 1991)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PIPER AIRCRAFT CORPORATION,	)	
	)	
Petitioner,	)	
	)	No. 91-543
v.	)	
	)	
EDWARD CHARLES CLEVELAND,	)	
by and through the	)	
Conservator of his Estate,	)	
KATHLEEN CLEVELAND;	)	
KATHLEEN CLEVELAND,	)	
individually,	)	
	)	
Respondents.	)	

ORDER
Filed March 14, 1991

Before LOGAN and ANDERSON, Circuit Judges.

This matter comes on for consideration of the petition of Piper Aircraft Corporation for permission to appeal under 28 U.S.C. Section 1292(b).

Upon consideration whereof, the petition for leave to appeal is granted.

The date of this order shall serve as the date of the notice of appeal for calculating filing times under the Federal Rules of Appellate Procedure and the Tenth Circuit Rules. Briefing shall follow 10th Cir. R. 31.1.

Entered for the Court

ROBERT L. HOECKER, Clerk
By /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

5. Opinion of the Court of Appeals, *Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540 (Nov. 15, 1989)

Edward Charles CLEVELAND, By and Through the Conservator of his Estate, Kathleen CLEVELAND; and Kathleen Cleveland, Individually, Plaintiffs-Appellants and Cross-Appellees,

v.

PIPER AIRCRAFT CORPORATION, a corporation, Defendant-Appellee and Cross-Appellant.

Nos. 86-2112, 86-2265.

United States Court of Appeals,
Tenth Circuit.

Nov. 15, 1989.

Daniel C. Cathcart of Magana, Cathcart, McCarthy & Pierry, Los Angeles, Cal. (Richard E. Ransom of Richard E. Ransom, P.A., Albuquerque, N.M., with him on the brief) for plaintiffs-appellants and cross-appellees.

David K. Watkiss of Watkiss & Campbell, Salt Lake City, Utah (Tracy H. Fowler of Watkiss & Campbell and W. R. Logan of Civerolo, Hansen & Wolf, P.A., Albuquerque, N.M., with him on the brief), for defendant-appellee and cross-appellant.

Before SEYMOUR and EBEL, Circuit Judges, and RUSSELL, District Judge.*

DAVID L. RUSSELL, District Judge.

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* Honorable David L. Russell, District Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

This case arises from a bizarre set of facts. On July 8, 1983, Edward Charles Cleveland attempted to take off from Mid-Valley Airport, Los Lunas, New Mexico, in a Piper Super Cub Model PA-18-150 aircraft, towing a glider attached to the aircraft's tail with a rope. Mr. Cleveland was piloting the aircraft from the rear seat and was secured by a seat belt but not a shoulder harness. The front pilot's seat had been removed the evening before at the direction of Mr. Cleveland and Robert Mudd, the glider pilot and an F.A.A. certified mechanic, and a camera and camera mount had been attached to the base of the removed front seat. This was done because it was Cleveland's intent to film the glider in flight for a television commercial. Stephen Marks, a cinematographer, was in the front of the aircraft facing rearward, seated on two by fours fitted with a furniture pad and secured with a seat belt. During take-off the plane collided head-on with a van which had been parked at the end of the runway. Shortly before impact, the tail of the plane rose off the ground, and the glider became airborne. Mr. Mudd, the glider pilot, saw the van on the runway and released the tow rope, allowing the glider to sail over the collision.

At the time of the accident, the Super Cub aircraft was owned by Etchison "Greg" Lill. Mr. Lill employed Mr. Cleveland as a glider tow pilot at Valley High Soaring, which operated glider planes at the Mid-Valley Airport. Mr. Lill and Mr. Cleveland were involved in a dispute with John Wood, the owner of the airport, concerning the glider operation's compliance with FAA rules and regulations. Two days prior to the accident, Mr. Wood had stopped Mr. Cleveland on the taxiway by turning his van crosswise in front of Mr. Cleveland's aircraft. He warned Mr. Cleveland that he was not going to fly from the airport if he did not comply with the rules and regulations. The day before the accident, Mr. Wood had called the FAA, notified them that he was closing the airport and blocked the north end of the runway and taxiway of the airport during daylight hours with blocks, a box and several parked vehicles. A court hearing concerning Valley High Soaring's operations at Mid-Valley Airport had been scheduled for 9:00

a.m. on the day of the accident. Mr. Cleveland was aware that the airport had been closed the day before the accident and was aware of the scheduled hearing. When Mr. Wood awoke on the day of the accident, he saw activity and lights at the north end of the airport. He then drove his van onto the south end of the runway and parked it in the center of the runway, facing north, leaving its headlights on. Shortly thereafter, the aircraft struck the van head on. The fuselage of the plane broke in two upon impact. Mr. Cleveland's head struck the camera resulting in serious head and brain injuries.

Mr. Cleveland's wife, the conservator of his estate, brought this diversity action against Piper Aircraft Corporation, which manufactured and sold the Super Cub aircraft in 1970, claiming in negligence and strict liability that the airplane had inadequate rear seat pre-flight visibility, which caused the collision, and lacked a rear seat harness, which caused the injuries. Mrs. Cleveland's individual claim for loss of consortium was dismissed.[1]

Plaintiff filed a motion *in limine* to exclude "cause of crash evidence" as irrelevant to his "second collision" crashworthiness case, which motion was denied. Plaintiff also filed a motion for certification to the New Mexico Supreme Court of the question of whether evidence of the cause of the initial crash is admissible in a "second collision" crashworthiness case which is limited to damages from enhanced injuries caused by the second impact only. Plaintiff stated in his motion that he would pursue only the claim for damages from enhanced injuries in the second collision if evidence of causation was limited to that relevant to cause of the enhanced injuries and the apportionment of fault concurring in their cause. This motion was also denied. Plaintiff's action then proceeded to trial based on two theories of

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[1] Although Mrs. Cleveland, as the conservator of her husband's estate, remained the real party Plaintiff in this action, for the sake of simplicity we will hereinafter refer to Edward Charles Cleveland as the Plaintiff.

design negligence under New Mexico law -- inadequate forward visibility from the rear pilot's seat during take-off and lack of a shoulder harness for the rear pilot's seat.

Following a five-day jury trial, the case was submitted to the jury on a special verdict form. Defendant objected to the special verdict form inasmuch as Question No. 7B, directed to the second collision or crashworthiness claim, only permitted the jury to compare Piper's negligence in failing to provide a rear seat harness to the negligence of Cleveland, and did not permit the jury to compare therewith the negligence of non-parties whose negligence was the proximate cause of Plaintiff's crashworthiness injuries. The objection was overruled. The jury found that Piper was negligent in the design, manufacture and/or sale of the aircraft without adequate forward vision from the rear seat; that this negligence (referred to at trial and herein as "design negligence," as distinguished from what was referred to at trial and will be referred to herein as "crashworthiness design negligence," i.e., the lack of a rear seat shoulder harness) was "a proximate cause of injuries and damages to plaintiff Ed Cleveland"; that Piper was also negligent in not installing a rear seat shoulder harness at the time of sale of the aircraft or was negligent in not later fitting the plane with a rear seat shoulder harness; that this "crashworthiness design negligence" was a proximate cause of injuries and damages to Cleveland; and that 100% of Cleveland's injuries were attributable to crashworthiness or lack of a shoulder harness. R.Vol. I at Tab 108.[2] The jury found that Cleveland's total damages caused by

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[2] The special verdict of the jury reads as follows:

> We, the Jury, unanimously agree to the following answers to the following Interrogatories.
>
> 1. Under what has been called the design negligence claim, was the defendant Piper Aircraft Corporation negligent in the design, manufacture and/or sale of the aircraft without adequate forward vision from the rear

seat? Yes _x_ No ____ (If the answer to No. 1 is "No", you are to skip No. 2 and answer No. 3.)

2. Was the design negligence a proximate cause of injuries and damages to plaintiff Ed Cleveland? Yes _xx_ No ___

3. Under what has been called the crashworthiness claim, was defendant Piper Aircraft Corporation negligent in not installing a rear seat shoulder harness at the time of sale of the aircraft or was it negligent in not later fitting the plane with a rear seat shoulder harness? Yes _xx_ No ___
(If the answer to No. 1 or 2 is "no", and the answer to No. 3 is also "no", then your foreman shall sign this verdict for the defendant and against the plaintiff, and you will all return to open court.)

4. Was the crashworthiness negligence of defendant Piper Aircraft corporation a proximate cause of injuries and damages to plaintiff Ed Cleveland? Yes ___ No ___

(If the answer to No. 4 is "yes", you are to answer the remaining questions on this verdict form. when you have agreed upon each of your answers, your foreman shall sign this verdict, and you will all return to open court. If the answer to No. 1 or 2 is "No", and the answer to No. 4 is also "No", then your foreman shall sign this verdict for the defendant and against the plaintiff, and you will all return to open court.)

5. What percentage, if any, of Ed Cleveland's injuries do you attribute to crashworthiness (lack of shoulder harness)?
100%

design negligence due to inadequate forward vision and by crashworthiness negligence due to lack of a rear shoulder harness were $2,500,000.[3] The jury compared the following persons' and entity's negligence as to the design negligence or

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6. In accordance with the damage instruction, we find the total amount of damages caused by design negligence due to inadequate forward vision and by lack of crashworthiness due to lack of rear shoulder harness to be $2,500,000.00. (Enter the total amount of damages without any reduction for any negligence of anyone.)

7. Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%, but the percentage for any one or more of the persons named may be zero if you find that such person was not negligent or that any negligence on the part of such person was not a proximate cause of damage.

A. Under what has been called the design negligence claim (inadequate forward vision):

Edward Charles Cleveland	42.5%
Piper Aircraft Corporation	41.7%
John "Jack" Wood	0
Robert Mudd	15.8
Total	100%

B. Under what has been called the crashworthiness design negligence claim (lack of shoulder harness in rear seat):

Edward Charles Cleveland	8.4%
Piper Aircraft Corporation	91.6%
Total	100%

[3] *See* note 2, *supra*.

inadequate forward visibility claim and assigned these percentages of negligence to them: Cleveland, 42.5%; Piper, 41.7%; Wood, 0%; Mudd, 15.8%.[4] With respect to the crashworthiness claim, the jury compared the negligence of Cleveland and Piper only, finding that Cleveland's negligence accounted for 8.4% of the damages and Piper's accounted for 91.6% of the damages for this claim.[5] The trial court thereafter entered judgment in favor of Plaintiff Edward Charles Cleveland and against Defendant Piper Aircraft Corporation in the amount of $1,042,500 plus post-judgment interest and costs. R.Vol. I at Tab 111. The court apparently arrived at the amount of the judgment by multiplying the percentage of negligent fault attributed to Piper on the design defect or forward vision claim, only, times the total amount of damages the jury found Plaintiff sustained as a result of the accident and the lack of crashworthiness of the aircraft. On the same day, Plaintiff filed a motion to enter judgment on proportionate liability for crashworthiness design negligence in the amount of $2,290,000, a figure arrived at by multiplying Piper's 91.6% comparative negligence times the total amount of damages, $2,500,000, since the jury determined that 100% of the damages were attributable to the lack of a shoulder harness.

Thereafter, Defendant moved alternatively for judgment notwithstanding the verdict or for a new trial. As grounds for its motion, Defendant asserted the absence of any proof of negligence in design and of proximate cause and that the accident and Plaintiff's conduct were unforeseeable as a matter of law. The district court denied these motions.

Plaintiff appeals to this Court, asserting as the sole basis for error the district court's failure to enter judgment on the crashworthiness claim rather than on the forward visibility claim. Defendant Piper cross appeals, asserting that the district

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[4] *Id.*

[5] *Id.*

court erred in denying its motions for a directed verdict and for judgment notwithstanding the verdict because 1) Plaintiff's evidence of crashworthiness design negligence did not meet New Mexico's standard of proof for design negligence -- a showing of deviation from laws, regulations or industry standards; 2) Plaintiff's evidence failed to establish that any design negligence proximately caused Plaintiff's injuries; 3) Plaintiff's conduct was unforeseeable as a matter of law; and 4) the conduct of Plaintiff and of Mr. Wood were independent intervening causes as a matter of law. Defendant also asserts that the district court should have ordered a new trial and committed reversible error because it rejected a standard New Mexico special verdict form, employing instead one which did not permit the jury to compare the negligence of all persons or entities, including non-parties, which proximately caused Plaintiff's injuries, and which was inconsistent with the court's pretrial rulings and misleading.

I.

In his sole argument supporting his appeal, Plaintiff asserts that because the jury found by special verdict that 100% of Plaintiff's injuries were caused by the lack of a shoulder harness, *see* R.Vol. I at Tab 108, Question No. 5, the district court erred by entering judgment on the design negligence claim for inadequate forward visibility rather than on the crashworthiness design negligence claim predicated on the lack of a rear seat shoulder harness.

We agree with Plaintiff that the district court's judgment was inconsistent with the jury's finding that 100% of Plaintiff's injuries were attributable to lack of crashworthiness. However, in determining whether the judgment entered was the proper one to enter on the jury's special verdict, our inquiry may not focus on one of the jury's findings to the exclusion of all of its other findings. By special verdict the jury also found that both the design negligence (lack of forward visibility) and the crashworthiness design negligence (lack of a rear seat shoulder harness) were proximate causes "of injuries and damages to plaintiff Ed Cleveland." R.Vol. I at Tab 108, Question Nos. 2 and 4. The jury's finding that the design negligence of

Defendant was a proximate cause of Plaintiff's injuries and damages is facially inconsistent with its finding that 100% of Plaintiff's injuries are attributable to crashworthiness design negligence. Thus, Plaintiff's appeal necessarily encompasses a determination of whether the special verdict answers are reconcilable with each other and with the entire case, including the pleadings, the evidence and the instructions, *see Harvey by Harvey v. General Motors Corp.*, 873 F.2d 1343, 1348 (10th Cir.1989), and if so, whether the special verdict answers are reconcilable in a manner which would warrant entry of judgment for Plaintiff on the crashworthiness design negligence claim rather than on the negligence design claim. If the verdicts are inconsistent as a matter of law, we must remand the case for a new trial. *See, e.g., Moss v. The City of Colorado Springs*, 871 F.2d 112, 114 (10th Cir.1989). If the verdict answers are reconcilable but not in a manner warranting entry of judgment on the crashworthiness design negligence claim, the judgment must be affirmed unless other errors preclude affirmance. If the verdict answers are reconcilable in a manner warranting entry of judgment on the crashworthiness design negligence claim, we must remand to the district court with directions to enter judgment thereon. If the verdict answers are reconcilable in a manner warranting entry of judgment on the crashworthiness design negligence claim, but the special verdict form did not, for example, permit the jury to compare the negligence of all of those whose negligence may have caused or contributed in causing injuries Plaintiff received in the "second collision" or as a result of the lack of a rear seat shoulder harness, then we must vacate the judgment and remand this case to the district court for a new trial.

Plaintiff does not suggest how the apparent inconsistent findings in the special verdict can be harmonized. His argument *assumes* that the answers warrant, or may be reconciled in a manner warranting, entry of judgment for Plaintiff on the crashworthiness design negligence claim and, accurately anticipating Defendant's responsive argument, is directed to the issue of whether, under New Mexico law, those whose

negligence was a proximate cause of the "initial collision" are legally responsible for "second collision" injuries as well. Plaintiff asserts that the jury's conclusion that 100% of Mr.Cleveland's injuries were proximately caused by the lack of a rear seat shoulder harness "means that *but for the lack of a rear seat shoulder harness Mr. Cleveland would not have been injured in the head-on collision, regardless of its cause.*" Brief of Appellant Cleveland at p. 5. While this is true, Plaintiff argues therefrom that the converse is also therefore true, i.e., that "no causal link exists between any negligence causing the initial impact and Mr. Cleveland's catastrophic injuries resulting solely from the 'second collision.'" *Id.* at p. 10. Relying on *Duran v. General Motors Corp.*, 101 N.M. 742, 688 P.2d 779, 787 (Ct.App.1983), *cert. quashed* 101 N.M. 555, 685 P.2d 963 (1984), *citing Huddell v. Levin*, 537 F.2d 726, 738 (3rd Cir.1976), Plaintiff asserts that those responsible for the "initial collision" are not concurrent tortfeasors with those responsible for the "second collision." Plaintiff then implies that the negligence of those who are *not* concurrent tortfeasors should not be compared under New Mexico's pure comparative negligence jurisprudence, in which joint and several liability of concurrent tortfeasors has been eliminated, *see Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (Ct.App.1982), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982). Rather, Plaintiff suggests that those responsible for the initial and second collisions are in fact successive tortfeasors. Plaintiff posits that the negligence of the former need not be compared to the negligence of the latter because "New Mexico has never abolished joint and several liability for successive tortfeasors." Brief of Appellant Cleveland at p. 9.

Defendant in response initially asserts that the district court properly applied New Mexico comparative negligence law in deciding that the initial accident and crashworthiness injuries were inseparable as far as apportionment was concerned. However, Defendant does not explain and it is incomprehensible to this Court how the conclusion that the initial accident and crashworthiness injuries were indivisible in any way supports the

propriety of either the special verdict form, which required division of injuries and apportionment of damages and comparison of negligence separately among those responsible for the "initial collision" and among those responsible for the "second collision," or entry of the judgment which was entered. The remainder of Defendant's argument in response to Plaintiff's appeal is more cogent. Defendant apparently agrees with Plaintiff that a manufacturer whose negligence causes "second collision" or crashworthiness injuries and a person whose negligence causes the "initial collision" are not concurrent tortfeasors but are successive tortfeasors. However, Defendant asserts that Plaintiff's position that the negligence of the initial tortfeasors should not be compared to the negligence of the tortfeasors responsible for the second collision is directly contrary to *Huddell v. Levin*, 537 F.2d 726; to most cases from other jurisdictions addressing comparative apportionment in crashworthiness cases; and to the goal of equitable loss allocation embodied in New Mexico law of comparative negligence adopted in *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981) and extended in *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 and *Marchese v. Warner Communications, Inc.*, 100 N.M. 313, 670 P.2d 113 (Ct.App.1983), *cert. denied*, 100 N.M. 259, 669 P.2d 735 (1983).

Because we conclude that New Mexico law requires that the jury compare the negligence of those responsible for the "initial collision" with the negligence of those responsible for "second collision" or crashworthiness injuries, requiring that we vacate the judgment entered and remand this case for a new trial, we find it unnecessary to determine whether the special verdict findings may be harmonized.

In *Duran v. General Motors Corp.*, 101 N.M. 742, 688 P.2d 779 (1983) the New Mexico Court of Appeals adopted a

crashworthiness doctrine[6] which limits crashworthiness liability to those circumstances in which a plaintiff can prove that a vehicle's lack of crashworthiness due to a manufacturer's negligence either enhanced injuries which the Plaintiff would have otherwise sustained in the accident if no crashworthiness negligence had occurred, or caused the ultimate injury. 688 P.2d at 781-82. In adopting its crashworthiness doctrine, the New Mexico Court of Appeals appropriated the standard of proof as to proximate cause employed in *Huddell v. Levin*, 537 F.2d 726 (3rd Cir.1976). This standard of proof of crashworthiness causation requires a plaintiff, as part of his prima facie case of crashworthiness liability, to prove 1) that the design caused injuries over and above those which otherwise would have been sustained, absent the defect; and 2) the degree of "enhancement," of injuries by "'proof of what injuries, *if any*, would have resulted had the alternative, safer design been used.'" *Duran v. General Motors Corp.*, 688 P.2d at 787, *quoting Huddell v. Levin*, 537 F.2d at 737 (emphasis added).[7] A plaintiff does not satisfy the second aspect of his causation burden by leaving the degree of enhancement to the jury's surmise and speculation; rather, "'the plaintiff must offer some method of establishing the extent of enhanced injuries attributable to the defective design.'" *Id., quoting Huddell v. Levin*, 537 F.2d at 738.

New Mexico's particular version of crashworthiness liability with its attendant burden of proximate cause, as we perceive it, necessarily precludes a cause of action for crashworthiness liability based upon an indivisible injury. In other words, the

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[6] The New Mexico Supreme Court has not to date addressed the issue of crashworthiness liability.

[7] *Huddell v. Levin* was a crashworthiness case predicated on New Jersey strict liability. There, the Third Circuit employed strict liability terms and concepts in describing a plaintiff's burden of proof. The New Mexico Court of Appeals in *Duran* adopted crashworthiness liability predicated on negligence, only.

concept of an "indivisible injury" has no place in New Mexico's crashworthiness doctrine. *Compare with, e.g., Fox v. Ford Motor Co.*, 575 F.2d 774, 787 (10th Cir.1978); *Lee v. Volkswagen of America, Inc.*, 688 P.2d 1283, 1287 (Okla.1984). New Mexico's adoption of *Huddell* standard of proof for proximate cause to establish crashworthiness liability requires that a plaintiff meet a burden of apportionment, i.e., of establishing that his crashworthiness injuries are divisible from those which would have been sustained as a result of the accident, absent the alleged crashworthiness defect; his failure to meet this burden is fatal to his crashworthiness claim. *See Huddell v. Levin*, 537 F.2d at 739. *Accord Hebenstreit v. Atchison, Topeka & Santa Fe Ry. Co.*, 65 N.M. 301, 336 P.2d 1057, 1061 (1959) (to establish liability for aggravation or exacerbation of pre-existing injury, the plaintiff has the burden of proving with reasonable certainty the extent of the aggravation and failure of such proof is fatal to claim) (*cited in Duran v. General Motors Corp.*, 101 N.M. 742, 688 P.2d at 787). The district court correctly incorporated the concepts of divisibility and apportionment in the special verdict form, which required that the jury make a finding as to what percentage of Plaintiff's injuries were caused by the lack of a rear seat shoulder harness and permitted the jury to find those whose negligence caused or contributed to the crashworthiness injuries liable only for those enhanced injuries and not for any injuries sustained solely as a result of the "initial collision."[8] This disposes of Defendant's

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[8] This statement assumes that there was evidence from which a jury could find that Plaintiff probably would have sustained *some* injury or injuries solely as a result of the "initial collision," i.e., as a result of the accident, absent the alleged crashworthiness negligence.

We refer to injuries resulting from or caused by the "initial collision" as a shorthand method of referring to those injuries which a plaintiff would have received in an accident in the absence of crashworthiness negligence, *see Duran v. General Motors Corp.*, 688 P.2d at 786-87. Similarly, we refer to

argument that the district court correctly concluded that Plaintiff's injuries were indivisible and that this conclusion somehow supports the court's entry of judgment based upon the percentage of Defendant's negligence in causing the initial collision, i.e. on the forward visibility or the design negligence claim.

If no other issues were raised by Plaintiff's appeal and the facially inconsistent verdicts could be reconciled, we would thus be required to enter judgment or direct the district court to enter judgment for the Plaintiff based upon the jury's determination of the percentage of Defendant Piper's comparative negligence on the crashworthiness design negligence claim, since the jury found that 100% of Plaintiff's injuries and damages were attributable to the airplane's lack of crashworthiness (lack of a rear shoulder harness). However, as both Plaintiff and Defendant apparently recognized, whether this Court may enter such a judgment as the correct judgment to be entered on the special verdict, or may direct the district court to enter such a judgment, depends upon the nature of the relationship under New Mexico law between the original tortfeasors, i.e., those

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injuries resulting from or caused by the "second collision," i.e. the "crashworthiness injuries," to denote enhanced injuries attributable to crashworthiness negligence, *see id.* In using this shorthand, we do not mean to in any way suggest that "crashworthiness," "second collision" or "enhanced injury" liability (which terms the New Mexico Court of Appeals employs synonymously, *see id.* at 782) in New Mexico is dependent on a showing of separate, discrete impacts or collisions. Under New Mexico law, a single impact may produce both "initial collision" and "second collision" or crashworthiness injuries. This is true even if the plaintiff suffers but a single injury, provided that the plaintiff can show that absent the crashworthiness negligence, either the injury would have been less severe and the degree of severity attributable to the crashworthiness negligence, or that he would not have been injured at all.

whose negligence caused the "initial collision," and the crashworthiness tortfeasors, i.e., those whose negligence caused the "second collision" or the enhanced "crashworthiness" injuries, and the correct application of New Mexico comparative negligence law to that relationship. To support entry of judgment based on Piper's comparative negligence on the crashworthiness claim in accordance with the jury's answer to question 7B of the special verdict, which did *not* permit the jury to compare the negligence of the original tortfeasors with that of the crashworthiness tortfeasors, and in an attempt to justify the propriety of comparing the negligence only *among* the crashworthiness tortfeasors, Plaintiff argues as follows: 1) This is a "second collision" or "crashworthiness" case, not an enhanced injury case; 2) The original tortfeasors and crashworthiness tortfeasors are not concurrent tortfeasors; and 3) The original and crashworthiness tortfeasors are successive tortfeasors. Defendant on the other hand asserts that while the relationship between the original and crashworthiness tortfeasors is not that of concurrent tortfeasors for all accident results, their relationship is that of concurrent tortfeasors as to the enhanced injury, for purposes of comparative causation. *See* Combined Answer and Cross Appeal Brief of Appellee Cross-Appellant, Piper Aircraft Corporation, at pp. 20-21. We examine these arguments in turn.

Plaintiff distinguishes between this case and an "enhanced injury" case because the jury found that 100% of Mr. Cleveland's injuries and damages were attributable to the lack of crashworthiness. Plaintiff infers from this finding that the negligence of those causing the "second collision" was the *sole* cause of all of Plaintiff's injuries and damages and that those whose negligence caused the "initial collision" are not responsible for, had no causal role in and are not also legal or proximate causes of any of Plaintiff's injuries and damages. There are numerous problems with this argument. First, it ignores the fact that the jury *also* found that the design negligence was a proximate cause of Plaintiff's injuries and damages, *see* R.Vol. I at Tab 108, Question No. 2, and that the

negligence of Plaintiff and Robert Mudd were also proximate causes of Plaintiff's injuries and damages. *See id.* at Question No. 7A. Secondly, under New Mexico law the terms "crashworthiness," "second collision" and "enhanced injury," when used to describe a theory of liability, are synonymous. *See Duran v. General Motors Corp.*, 101 N.M. 742, 688 P.2d at 782. All refer to liability based on either "enhanced *or additional* injuries" caused by a negligent failure to protect against injury in the event of a collision. See *id.* at 787 (emphasis added). Under New Mexico law, an enhanced injury is any injury "*over and above* the damage or injury that probably would have occurred as a result of the impact or collision absent the defect." *Id.* at 786, *quoting Larsen v. General Motors Corp.*, 391 F.2d 495, 503 (8th Cir.1968), which necessarily includes not only any aggravation or enhancement of an injury which was or would have been sustained in the initial collision, absent the manifestation of any crashworthiness negligence, but *also* any "new" or "different" injury which was not and would not have been sustained in the initial collision absent the manifestation of any crashworthiness negligence. *See id.* at 787 ("crashworthiness liability is based only on enhanced or additional injuries"). Thus, even when a plaintiff's claim is that he would not have received *any* injuries as a result of the "initial collision" absent the existence of crashworthiness negligence, as here, New Mexico courts refer to the plaintiff's claim as one for enhanced injury. Of course, we recognize that Plaintiff's argument is not fully answered by pointing out that New Mexico law envisions that all crashworthiness liability claims are claims for enhanced injuries and that "enhanced injuries" include new and different injuries. But even if the jury's finding that 100% of the Plaintiff's injuries are "attributable" to crashworthiness design negligence represents an implicit finding that Plaintiff would not have received any injuries as a result of the "initial collision," absent the manifestation of crashworthiness negligence, it does not necessarily follow, as Plaintiff suggests, that the negligence of the original tortfeasors is not also a

proximate cause of the crashworthiness injuries.[9] In other words, the converse does not necessarily follow. *See Martinez v. First National Bank of Santa Fe*, 107 N.M. 268, 755 P.2d 606, 607 (Ct.App.1987), *writ dismissed*, 107 N.M. 308, 756 P.2d 1203 (1988).

Plaintiff suggests that because the *Duran* court, citing *Huddell*, stated that "the concurrent tortfeasor concept is not applicable" to crashworthiness liability, 688 P.2d at 787, the negligence of the "original tortfeasors" is not considered a proximate cause of crashworthiness injuries and/or the negligence of the original tortfeasors need not be compared with the negligence of the "crashworthiness tortfeasors"[10] under New Mexico law. Because the New Mexico Court of Appeals in *Duran* cited *Huddell* as authority for its statement, we discern its meaning by referring to the *Huddell* court's discussion of concurrent tortfeasors:[11]

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[9] In this respect, the jury's findings that the negligence of certain alleged original tortfeasors--Piper and Mudd--was a proximate cause of the Plaintiff's injuries and damages, despite its finding that 100% of Plaintiff's injuries and damages were attributable to crashworthiness negligence, was prescient and fully supportable by New Mexico law of proximate cause.

[10] We use the term "original tortfeasors" to refer to those persons or entities whose negligence causes or concurs in causing a collision in which a potential plaintiff receives injuries. We employ the term "crashworthiness tortfeasors" to refer to those persons or entities whose negligent failure to protect a potential plaintiff from injuries in a collision causes or concurs in causing a potential plaintiff to sustain injuries he would not otherwise have sustained in the collision, absent such negligence.

[11] The following statement by the Court in *Huddell* was prompted at least in part by the concurring judge's opinion that death is indivisible and that those whose negligence concurs in causing such injury are concurrent tortfeasors who, rather than a

It is well, indeed necessary, to emphasize the fundamental point of departure between our approach and that proffered by the concurrence. We do not perceive the analysis of "second collision" or "enhanced injury" cases to track the legal lore surrounding concurrent tortfeasor actions which, in the concurrence's formulation, "have combined *contemporaneously* to cause the injuries." Concurring opinion, *post*, at 744 (Emphasis added.) "Second collision" cases do not implicate "clearly established double fault" for the *same* occurrence. Clearly, if the theoretical underpinnings for liability in this case are to be given effect, Levin [the original tortfeasor] may be held liable for *all* injuries, but General Motors [the crashworthiness tortfeasor] may only be held liable for "enhanced injuries." Analogies to concurrent actions combining to cause a *single impact* are simply not applicable where, as here, one party is sued on a fault theory for the collision and the other party is sued on the theory of strict liability for the "second collision." A second source of disagreement between us and Judge Rosenn is the latter's assumption that "[a] failure in apportionment must then needs excuse both wrongdoers." *Ibid.* at 744. The burden of apportionment applies only to plaintiff's claim against General Motors. Should plaintiff fail to meet her burden on

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plaintiff, should have the burden of apportionment, if apportionment is possible, or of otherwise limiting their liability by proving their nonculpability. *See Huddell v. Levin*, 537 F.2d at 744-47 (Rosenn, J., concurring).

> this claim, the brute fact is that the negligent driver would *not* escape liability on the same ground. Traditional negligence concepts determine the case against Levin and the extent of his liability.
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> *Huddell v. Levin*, 537 F.2d at 738-39 (bracketed identification added).

We are persuaded by the foregoing discussion in *Huddell* that the New Mexico court's statement that the concurrent tortfeasor concept is not applicable to crashworthiness liability simply means that a crashworthiness tortfeasor is not a concurrent tortfeasor with an original tortfeasor as to injuries which would have been sustained as a result of the initial collision, absent crashworthiness negligence, but that an original tortfeasor, whose negligence may be deemed to have proximately caused *all* of the injuries, *is or at least may be* a concurrent tortfeasor with a crashworthiness tortfeasor as to the enhanced injuries. Any doubts we might otherwise have that this was the New Mexico Court of Appeals' intent or that the relationship of the original and crashworthiness tortfeasors described in *Huddell* would be altered by New Mexico law are resolved by our observation that this is fully consistent with New Mexico law on the relationship between a tortfeasor whose negligence produces an initial injury and another tortfeasor whose negligence aggravates or enhances the original injury and New Mexico law on proximate cause. *See Martinez v. First National Bank of Santa Fe*, 107 N.M. 268, 755 P.2d 606 (Ct.App.1987) (defendant physician should not be liable in malpractice for plaintiff's original injury, but damages should be apportioned among those negligently contributing to the malpractice injury, including an absent original tortfeasor, if their negligence was a proximate cause of the injury, *citing* Comment b, *Restatement (Second) of Torts* § 879 (1979); a negligent non-party original tortfeasor may be liable for the additional harm caused the victim by a physician negligently treating the victim if negligent treatment is the foreseeable result of the original injury); *Vaca v. Whitaker*, 86 N.M. 79, 519 P.2d

315, 318-19 (Ct.App.1974) (where the judgment against the original tortfeasor covers all injuries sustained by the plaintiff, including those attributable to the negligence of a physician in treating the injured person, satisfaction of that judgment bars the plaintiff from recovering the same damages in a subsequent suit against the physician).

The relationship between original and crashworthiness tortfeasors as to all accidents results may properly be described as that of successive tortfeasors. *See Martinez v. First National Bank of Santa Fe*, 107 N.M. 268, 755 P.2d at 608. *Accord*, W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 52, p. 352 (5th ed. 1984); Comment c on subsection (1), *Restatement (Second) of Torts* § 433A (1979). Their relationship, however, is that of a particular type of successive tortfeasors, that in which the original tortfeasors may be liable for all of the injuries received and thus may be concurrent tortfeasors or jointly and severally liable with the crashworthiness tortfeasors as to the enhanced injuries only. *See id.* But regardless of the terminology employed to describe the relationship between the original tortfeasors and crashworthiness tortfeasors, it is clear that under New Mexico law of proximate cause, both the original tortfeasors and the crashworthiness tortfeasors may be liable for the second-collision or enhanced injuries. *See Martinez v. First National Bank of Santa Fe*, 107 N.M. 268, 755 P.2d at 607-10; *Vaca v. Whitaker*, 86 N.M. 79, 519 P.2d at 318-19. *See generally LeBlanc v. Northern Colfax County Hospital*, 100 N.M. 494, 672 P.2d 667 (Ct.App.1983); N.M.Stat.Ann., U.J.I.-Civ. 3.8 & 3.9 (Repl.Pamp.1980).

The final issue we must address in determining whether judgment may properly be entered on the crashworthiness claim based on the jury's finding of Defendant Piper's percentage of comparative negligence for crashworthiness injuries, assuming again that the special verdict findings are reconcilable, is how New Mexico law of comparative negligence applies to original and crashworthiness tortfeasors with respect to the enhanced injuries for which they may both be liable as concurrent tortfeasors.

New Mexico has adopted a system of "pure" comparative negligence. *See Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981). The purpose of this doctrine is

> to accomplish (1) apportionment of fault between or among negligent parties whose negligence proximately causes any part of a loss or injury; and (2) apportionment of the total damages resulting from such loss or injury in proportion to the fault of each party.
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> *Id.* at 1240.

Thus, the doctrine contemplates that percentages of comparative negligence of those whose negligence proximately causes a plaintiff's injuries will be determined by the jury and that "apportionment of damages" will flow from that determination. In *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (Ct.App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982), the New Mexico Supreme Court made it clear that joint and several liability for concurrent tortfeasors was not to be retained under New Mexico's pure comparative negligence system, which requires that the fault or negligence of all concurrent tortfeasors be apportioned. 646 P.2d 585. In the New Mexico court's opinion, apportionment of causation among concurrent tortfeasors is accomplished as a necessary consequence of a jury's apportionment of fault or negligence under a pure comparative negligence system. See *id.* The logical extension of *Bartlett* to the case before this Court is that as to that portion of damages for which the original tortfeasors and the crashworthiness tortfeasors are concurrent tortfeasors, i.e. damages attributable to the enhanced injuries, only, the negligence of *all* of the tortfeasors, and of the Plaintiff, must be compared. This is consistent both with New Mexico law of proximate cause, *see* above, and with the goal of New Mexico comparative negligence law, that of achieving "apportionment of fault between or among negligent parties *whose negligence proximately caused any part of a loss or injury*". *Scott v. Rizzo*,

96 N.M. 682, 634 P.2d at 1240, *quoted in Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d at 586.

We are satisfied that the New Mexico Supreme Court would hold that common sense in the fair application of its pure comparative negligence system mandates that the negligence of all parties, including original tortfeasors and crashworthiness tortfeasors, which proximately causes enhanced injuries in a crashworthiness or "second collision" case must be compared. *See Scott v. Rizzo*, 96 N.M. 682, 634 P.2d at 1240. *See also Martinez v. First National Bank of Santa Fe*, 107 N.M. 268, 755 P.2d at 607-10; *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579.

II.

Defendant contends that Plaintiff's evidence of Defendant's failure to exercise due care by not fitting the Super Cub with a rear seat shoulder harness did not meet the standard of proof mandated by *Duran v. General Motors Corp.* for crashworthiness liability because Plaintiff's evidence assertedly consisted solely of expert opinion testimony, unsupported by any laws, regulations or industry standards. Defendant asserts that for this reason, the district court erred in denying Defendant's motions for a directed verdict and for judgment notwithstanding the verdict. However, as Plaintiff points out, Defendant did not make this argument in the district court to support either its motion for a directed verdict, *see* R.Vol. IV (Tr.Vol. 3) at pp. 608-11 & R.Supp. Vol.I (Tr.Vol. 5) at p. 835, or its alternative motion for judgment notwithstanding the verdict or for a new trial, *see* R.Vol.I at Tab 114. Failure to move for a directed verdict on this ground precludes Defendant from challenging the district court's denial of its motions for a directed verdict and for judgment notwithstanding the verdict on such basis now, and further precludes Defendant from challenging the sufficiency of the evidence of crashworthiness negligence on appeal. *See Karns v. Emerson Electric Co.*, 817 F.2d 1452, 1455-56 (10th Cir.1987) (failure to renew motion for directed verdict at the close of all of the evidence bars consideration of a motion for judgment notwithstanding the verdict and appellate review;

grounds not raised in a motion for a directed verdict may not be asserted in a motion for judgment notwithstanding the verdict or on appeal). *Accord, Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1459 (9th Cir.1988) (failure to move for a directed verdict at the close of all of the evidence bars a party from questioning the sufficiency of the evidence both before the district court and on appeal except where such plain error is apparent on the face of the record that failure to review would result in manifest injustice); *Myers v. Norfolk Livestock Market, Inc.*, 696 F.2d 555, 558 (8th Cir.1982) (same, but no plain error doctrine recognized); *Rawls v. Daughters of Charity of St. Vincent DePaul, Inc.*, 491 F.2d 141, 147 (5th Cir.), *cert. denied*, 419 U.S. 1032, 95 S.Ct. 513, 42 L.Ed.2d 307 (1974). Even if this issue had been properly preserved for appeal, Plaintiff's evidence of Federal Aeronautics Association [sic] and National Transportation Safety Board design guidelines, *see* R.Vol. IV (Tr.Vol. 3) at p. 465, satisfies the *Duran* requirement that crashworthiness negligence be established by proof of noncompliance with extrajudicial standards or guidelines. *See Duran v. General Motors Corporation*, 101 N.M. 742, 688 P.2d at 783-84.

III.

Defendant contends that Plaintiff's evidence of proximate causation on his crashworthiness claim is legally insufficient under *Duran* because Plaintiff's evidence failed to establish 1) that Plaintiff would have received the same injury had the front seat not been removed, i.e., Plaintiff failed to eliminate his product modification as a cause of his injury, and 2) what injuries Plaintiff would have sustained if he had been wearing a shoulder harness, i.e., in the absence of the alleged crashworthiness negligence.

We find no requirement in *Duran* that a crashworthiness plaintiff eliminate product modification as a proximate cause of crashworthiness injuries. *Duran* speaks only to the nature of the evidence necessary to show that crashworthiness negligence was a proximate cause of injuries over and above those that would have occurred as a result of the collision, absent the

crashworthiness negligence. Nor do we find any requirement under New Mexico negligence law that a plaintiff present evidence to eliminate product modification or his own negligence as a proximate cause of his injuries. Moreover, in this case, the jury was permitted to consider whether Plaintiff's modification of the aircraft was negligent and whether such negligence was a proximate cause of his crashworthiness injuries and to compare such negligence, if any, to Defendant Piper's crashworthiness negligence, if any, which was a proximate cause of Plaintiff's crashworthiness injuries. *See* R.Vol. I at Tab 104 (Court's Jury Instructions), Nos. 3, 13 & 20 and R.Vol. I at Tab 108 (Verdict).

As the district court correctly concluded, *see* R.Vol. I at Tab 124, Plaintiff's evidence amply supports the reasonable inference that Plaintiff would have sustained no injuries in the absence of the alleged crashworthiness design negligence, that is, that if he had been wearing a shoulder harness Plaintiff would not have been injured, and that this is true regardless of whether the front seat or the camera and camera mount were located to the fore of Plaintiff during the accident. Both of Plaintiff's expert witnesses, Dr. Richard Snyder and Dr. Norman Horton, testified that if Plaintiff had been wearing a shoulder harness, he would not have struck the camera. R.Vol. IV (Tr.Vol. 3), at p. 472 & 574. Both experts also testified that had the Plaintiff been restrained by a shoulder harness, he would not have struck the front seat either, had it been there. *Id.* at p. 508-11 & p. 568. Dr. Snyder testified that the camera was located in essentially the same position or even slightly to the fore of where the back of the front seat would have been had the front seat not been removed, relative to the position of the Plaintiff. *Id.* at 511. This evidence was corroborated by the testimony of Robert Mudd, *see* R.Vol. II (Tr.Vol. I) at p. 63, who participated in installing the camera mount and camera. *Id.* at p. 48. Since the only significant injury that Plaintiff received in the accident was a massive head injury, *see* R.Vol. I, p. 103, it is reasonably inferable from Plaintiff's evidence that Plaintiff would have received no injury had he been wearing a shoulder

harness.[12] Thus, there was evidence from which the jury could properly find that Plaintiff would have received no injuries if he had been wearing a shoulder harness.

The trial court did not err in denying Defendant's motions for a directed verdict and for judgment notwithstanding the verdict on the issue of proximate causation of crashworthiness injuries.

IV.

Defendant contends that the district court should have granted its motion for a directed verdict or its motion for judgment notwithstanding the verdict because Plaintiff's evidence failed to establish any negligent design defect which caused the collision. Defendant maintains that Plaintiff's own evidence established that the limitation on forward visibility from the rear seat was obvious and readily compensated for by following a standard piloting technique of making s-turns prior to take-off, a practice Plaintiff himself employed prior to attaching the glider to the Super Cub. Defendant then implies that it was Plaintiff's negligence, in attaching the glider, which caused any inadequacy in forward visibility and the collision as a matter of law. Defendant's argument is without merit.

The jury could have readily concluded that Plaintiff was negligent in attempting to fly the aircraft from the rear seat while towing a glider and that Plaintiff's negligence was a proximate cause of the collision, and apparently did, inasmuch as it found that Plaintiff was 42.5% comparatively negligent on the forward visibility claim. But the negligence of two or more persons may concur or combine in causing injury. Moreover,

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[12] Defendant also challenges Dr. Snyder's competence to give certain opinion evidence but because this challenge is predicated on the erroneous supposition that Plaintiff was required to prove that he would have received the same injuries had the front seat rather than the camera and its mount been located in front of him, we need not separately address this issue.

under New Mexico law, a plaintiff's assumption of risk is not a complete defense but is conduct which is properly the subject of comparative causation. *See* N.M.Stat.Ann., U.J.I.-Civ. 14-12 (Repl.Pamp.1980). *Accord, Proctor v. Waxler*, 84 N.M. 361, 503 P.2d 644, 646-47 (1972). *Cf. Marchese v. Warner Communications, Inc.*, 100 N.M. 313,670 P.2d 113, 116-18; *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d at 1240 (a plaintiff's misconduct or negligence in voluntarily and unreasonably encountering a known danger is not a complete defense to a products liability claim but is properly the subject of determining the plaintiff's comparative fault). Thus, evidence that Plaintiff's own negligence was a cause of the lack of forward visibility is not dispositive of the propriety of the district court's denial of the directed verdict and JNOV motions on the design negligence causation issue.[13] Rather, in reviewing the propriety of the district court's rulings on these motions, we must determine whether there is evidence from which a jury could properly find in favor of Plaintiff on this issue. *See, e.g., Brown v. McGraw-Edison Co.*, 736 F.2d 609, 612-13 (10th Cir.1984) (motion for judgment notwithstanding the verdict); *Martin v. Unit Rig & Equipment Co.*, 715 F.2d 1434, 1438 (10th Cir.1983) (motion for directed verdict). In making this determination, we must view the evidence most favorably to the Plaintiff and give him the benefit of all reasonable inferences therefrom. *Id.* We may not weigh the evidence, evaluate the credibility of the witnesses or substitute our judgment for that of the jury. *See id.* We will reverse a district court's denial of a motion for a directed verdict or of a motion for judgment notwithstanding the verdict only when the evidence and all of the inferences to be drawn therefrom point but one way and so conclusively favor of the moving party that reasonable persons could not find in favor of

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[13] Plaintiff contends that this issue is moot because the jury found that 100% of Plaintiff's injuries were attributable to the plane's lack of crashworthiness. Because we have concluded that the judgment herein must be vacated and the case remanded for a new trial, this issue is not moot.

the non-moving party. *See Farmers Insurance Co. v. Hubbard*, 869 F.2d 565, 570 (10th Cir.1989) (motion for judgment notwithstanding the verdict); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir.1988) (same); *Federal Deposit Insurance Corp. v. Palermo*, 815 F.2d 1329, 1335 (10th Cir.1987) (motions for directed verdict and for judgment notwithstanding the verdict); *E.E.O.C. v. University of Oklahoma*, 774 F.2d 999, 1001-02 (10th Cir.1985); *cert. denied*, 475 U.S. 1120, 106 S.Ct. 1637, 90 L.Ed.2d 183 (1986) (motion for judgment notwithstanding the verdict; *Hurd v. American Hoist and Derrick Co.*, 734 F.2d 495, 498-99 (10th Cir.1984) (both motions)).

Viewing the evidence most favorably to the Plaintiff and giving him the benefit of all reasonable inferences, we cannot say that the evidence points but one way, and that a reasonable jury could not properly find that considering all of the circumstances the risk of injury was foreseeable and would have been avoided by a reasonably prudent manufacturer, that Plaintiff's manner of use of the aircraft was foreseeable, and that Defendant's failure to use ordinary care to design the aircraft to avoid the risk of injury was a proximate cause of the Plaintiff's injuries.[14] *See Steinberg v. Coda Roberson Construction Co.*, 79 N.M. 123, 440 P.2d 798, 799 (1968); R.Vol. I at Tab 104 (Court's Jury Instructions), Nos. 4-9 & 11-13. The record contains substantial evidence that the design of the Super Cub significantly impairs forward visibility from the rear seat during take-off and that aircraft collisions with objects on the ground occur with regularity. The jury could have reasonably concluded that an ordinarily prudent manufacturer could reasonably expect that a pilot might fail or be unable to make s-turns to compensate for the lack of forward visibility despite awareness of the danger. *See Proctor v. Waxler*, 84 N.M. 361, 503 P.2d at 646-47; R.Vol. I at Tab 104 (Court's Jury Instructions), No. 12 (N.M. Stat.Ann., U.J.I.-Civ. 14-12

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[14] See our discussion of proximate cause *supra* at section I.

(Repl.Pamp.1980)) (duty to use ordinary care to prevent an unreasonably dangerous condition exists even if such condition would be obvious to the user, if the party creating such risk could reasonably anticipate that the user would fail to protect himself). The district court did not err in denying the motions for a directed verdict and for judgment notwithstanding the verdict predicated on a failure of proof that design negligence was a proximate cause of the collision.

V.

Defendant also contends that the district court erred in not granting its motion for a directed verdict or for judgment notwithstanding the verdict on the ground that the particular accident scenario and Plaintiff's misuse of the aircraft were unforeseeable as a matter of law and therefore, that Defendant had no duty to guard against such risks. Defendant argues that to require an airplane manufacturer to avoid the risks of what Defendant describes as a "dangerous combination of misconduct" by the Plaintiff would make it an insurer against pilots' intentional risk-taking and misuse, contrary to New Mexico law, citing *Daniell v. Ford Motor Co.*, 581 F.Supp. 728, 730 (D.N.M.1984) and *Van de Valde v. Volvo of America Corp.*, 106 N.M. 457, 744 P.2d 930 (Ct.App. 1987). Assuming that Defendant had a duty to guard against such risks, however, Defendant argues that its negligence was not established because Plaintiff failed to produce any evidence of what a reasonably prudent manufacturer could have done to have protected Plaintiff from the dangers created by Plaintiff's modification and operation of the aircraft. These arguments are without merit.

New Mexico law does not require that the "precise hazard or exact consequences which were encountered" be foreseeable. *Ortega v. Texas-New Mexico Railway Co.*, 70 N.M. 58, 62, 370 P.2d 201, 203 (1962); *Harless v. Ewing*, 80 N.M. 149, 151, 452 P.2d 483, 485 (Ct.App.1969). There was ample evidence at trial from which a jury could properly find that the risk of collision with an object on the runway and the Plaintiff's conduct were "*objectively reasonable* to expect," *Van de Valde v. Volvo of America Corp.*, 106 N.M. 457, 744 P.2d 930, 932

(Ct.App.1987), *quoting Mata v. Clark Equipment Co.*, 58 Ill.App.3d 418, 15 Ill.Dec., 980, 983, 374 N.E.2d 763, 766 (1978) and thus foreseeable. This evidence included evidence that every year many aircraft collisions with objects on the ground occur, *see* R. Vol. IV (Tr. Vol. 3) at pp. 550 & 569; evidence of Piper's Super Cub design, which permitted the plane to be flown from the rear seat and provided a large trapezoidal window for photography, *see id.* at pp. 534 & 551; Piper's owner's handbook's advice that rear seat operation of the craft is feasible, *id.* at p. 539, that the front seat could be removed entirely, *id.*, and that for photography from the aircraft, its right door and window could be opened during flight, *id.* at 551; Piper's flight manual's advice on the maximum allowable weight in the baggage compartment during rear seat flight, *id.* at pp. 542-43; the lack of any information in Piper's handbook or flight manual concerning s-turns or forward visibility during take-off for a rear-seat pilot, *id.* at pp. 549-50; and evidence of the Civil Aeronautics Administration's advice to Piper to placard its aircraft "Solo from front seat only." *Id.* at pp. 544-46.

The district court was correct in concluding that a plaintiff is not required to offer proof of benefit from an alternate design in order to establish design negligence. *See* R. Vol. I at Tab 114 (Memorandum Opinion and Order) at p. 2. All that was required was that the Plaintiff present evidence from which a jury could conclude that the risk of injury would have been avoided by a reasonably prudent person in the position of the manufacturer. *See* N.M.Stat.Ann., U.J.I.-CIV. 14-4 (Repl.Pamp.1980); *Steinberg v. Code Roberson Construction Co.*, 79 N.M. 123, 124, 440 P.2d 798 (1968). The jury could reasonably conclude from evidence concerning the lack of forward visibility from the rear seat of the tail dragger craft and the risk of accidents due to runway obstructions that a reasonably prudent manufacturer would have designed the craft in a manner to avoid runway accidents resulting from such visibility limitation. Plaintiff's evidence of at least two alternate designs by which Defendant could have avoided the risk, *see* R. Vol. IV (Tr. Vol. 3) at pp. 555-56 & 584-85, while not critical,

was simply additional evidence from which the jury could conclude that a reasonably prudent manufacturer could have and would have avoided the risks in question. The district court properly rejected Defendant's directed verdict and JNOV motions predicated upon the asserted unforeseeabilty of the accident and the Plaintiff's conduct and on the asserted lack of proof of an alternate design.

VI.

Defendant recasts previous arguments concerning whether design negligence was a proximate cause of the accident and whether Plaintiff's modification of and use of the aircraft were unforeseeable to finally urge that both the Plaintiff's conduct and the deliberate obstruction of the runway by Mr. Wood, or a combination thereof, were independent intervening causes as a matter of law. What we have already said concerning the issue of foreseeability disposes of this argument. There was evidence from which a jury could reasonably conclude that both Plaintiff's conduct and an obstruction on the runway were foreseeable. If an intervening act or cause is one which is reasonably foreseeable, the intervening act does not break the chain of causation and the original tortfeasor's negligence remains a proximate cause of the injury which finally results. *Thompson v. Anderman*, 59 N.M. 400, 285 P.2d 507, 514-15 (1955); N.M.Stat.Ann., U.J.I.-Civ. 3.8 & 3.9 (Repl.Pamp.1980). *See also Achin v. Begg Tire Center*, 694 F.2d 226, 228-29 (10th Cir.1982) (applying New Mexico law) (independent intervening cause is one which could not have reasonably been foreseen or one which the defendant had no reason to anticipate under the particular circumstances).

VII.

In a final contention in its cross appeal, Defendant asserts that the district court erred in denying its motion for a new trial because the district court erred in rejecting a standard New Mexico special verdict form proposed by Defendant in favor of one that was inconsistent with the court's ruling on the indivisibility of Plaintiff's injury and improperly did not permit

the jury to compare together the negligence of all persons which caused the "initial collision" and that of all persons which caused the enhanced injuries, only. In addition, Defendant contends that questions in the special verdict form asking the jury to compare the negligence of non-parties and of Plaintiff to that of Defendant on the "design negligence claim" and to compare Plaintiff's and Defendant's negligence under the "crashworthiness design negligence claim" were confusing.

Defendant did not move for a new trial on this basis. Indeed, as the district court properly found, Defendant cited no grounds for its new trial motion. R. Vol. I Tab 124 (Memorandum Opinion and Order) at p. 5. Hence, no issue is presented for our review by virtue of the district court's denial of the new trial motion.

In its reply brief Defendant argues that the asserted errors in the special verdict form to which Defendant made objection at trial may nevertheless be raised on appeal, even if they were not the subject of a new trial motion, citing *Hansen v. Vidal*, 237 F.2d 453 (10th Cir.1957) and 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2540 (1971). With respect to aspects of the special verdict form to which no objections were made by Defendant at trial, Defendant suggests that we may review the special verdict form under the limited exception which permits us to review instructions to which proper objection was not made if they are "patently plainly erroneous and prejudicial," *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1516 (10th Cir.1984), *aff'd* 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985), *quoting Brown v. McGraw-Edison Co.*, 736 F.2d at 614 n. 6 (*quoting Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 924 (10th Cir.), *cert. denied*, 469 U.S. 853, 105 S.Ct. 176, 83 L.Ed.2d 110 (1984)), or for "plain error if it was a 'generating factor which culminated in a verdict not warranted under the law.'" *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d at 1516 n. 6, *quoting Herndon v. Seven Bar Flying Service, Inc.*, 716 F.2d 1322, 1330 (10th Cir.1983), *cert. denied*, 466 U.S. 958, 104 S.Ct. 2170, 80 L.Ed.2d 553 (1984).

We agree with Defendant that its objection to the form of the special verdict employed by the district court preserved for our review any errors therein which were the bases for Defendant's objection, even though such asserted errors were not made the bases of a motion for a new trial or for judgment notwithstanding the verdict. *See Hansen v. Vidal*, 237 F.2d 453 (10th Cir.1956). See *generally* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2540 at p. 611.

Defendant objected to question 7B in the special verdict form on the ground that it did not allow for the comparison of "the fault of any non-party and party" on the crashworthiness claim. R.Supp. Vol. I (Tr. Vol. 5) at p. 835. By way of further explanation, Defendant directed the Court to the special verdict form which it prepared and offered (R. Vol. I at Tab 105). *Id.* Defendant's proposed special verdict form would have permitted the jury to compare the negligence of the following persons which the jury found was a proximate cause of the Plaintiff's damages: Defendant, Plaintiff, John "Jack" Wood, Robert Mudd, Etchison Greg Lill, Arnold Lerner, and Stephen Marks. R. Vol. I at Tab 105, No. 4. Plaintiff contends that Defendant's objection to question 7B did not specify what non-parties should have been included. Plaintiff further seems to suggest that Defendant's reference to its own proposed verdict form either did not provide the necessary identification of non-parties or instead actually raised an objection to the Court's separation of the "design negligence claim," for inadequate forward visibility and comparisons of negligence on that claim, from the "crashworthiness design negligence claim" for lack of a shoulder harness and comparisons of negligence on that claim, since the special verdict form proposed by Defendant did not separate these claims. We disagree.

As should be obvious from what we have said in connection with Plaintiff's appeal, *see* section I, *supra*, the trial court should have permitted the jury to determine whether the negligence of original tortfeasors was a proximate cause of Plaintiff's enhanced injuries, and to compare the negligence of any original tortfeasors found to be a proximate cause of the enhanced

injuries to the negligence of any crashworthiness tortfeasors and of the Plaintiff which was found to have proximately caused Plaintiff's enhanced injuries. The special verdict form was erroneous and contrary to New Mexico law because it did not permit the jury to do so. As we have already indicated, our remand of this case to the district court for a new trial is necessary on this basis.

Defendant argues on appeal that the district court erroneously rejected Defendant's proffered special verdict form, based upon New Mexico's Uniform Standard Jury Instructions--Civil 22.20, for one which assertedly improperly separated the forward visibility issue from the restraint system issue and which was misleading because it asked the jury to make comparisons of parties' and non-parties' negligence on Plaintiff's "design negligence claim (inadequate forward vision)" and on Plaintiff's "crashworthiness design claim (lack of shoulder harness in rear seat)." Defendant did not object to the special verdict form on these grounds.

Ordinarily, we will not consider on appeal an asserted error in the form of a Rule 49(a) special verdict unless an objection to the special verdict form on that ground was made at trial. *See Golub v. J.W. Gant & Associates*, 863 F.2d 1516, 1521 (11th Cir.1989) (interrogatories); *Frensley v. National Fire Insurance Company of Hartford*, 856 F.2d 1199, 1203 (8th Cir.1988) (interrogatories); *J.C. Motor Lines, Inc. v. Trailways Bus System, Inc.*, 689 F.2d 599, 603 (5th Cir.1982) (interrogatories); *Charles Stores, Inc. v. Aetna Insurance Co.*, 490 F.2d 64, 67-68 (5th Cir.1974) (interrogatories or special verdict); *Clegg v. Hardware Mutual Casualty Co.*, 264 F.2d 152, 158 (5th Cir.1959) (special verdict or interrogatories); *Filipek v. Moore-McCormack Lines, Inc.*, 258 F.2d 734, 736 (2nd Cir.1958), *cert. denied*, 359 U.S. 927, 79 S.Ct. 605, 3 L.Ed.2d 629 (1959) (interrogatories); *Huse v. Consolidated Freightways, Inc.*, 227 F.2d 425, 430 (7th Cir.1955) (special verdict). Assuming without deciding that we could review the form of the special verdict employed for plain or "fundamental error," *see Golub v. J.W. Gant & Associates*, 863 F.2d at 1521 n. 6; *Dunn v. Ove*

Skou Rederi A/S, 45 F.R.D. 18 (E.D.Pa.1968), just as we may review "patently plainly and prejudicial" instructions to which no objection is made, *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d at 1516, our determination that the judgment herein must be vacated and the case remanded for a new trial renders such review unnecessary and any error and prejudice suffered by Defendant moot.

Because this case must be retried, however, we offer the following guidance to the district court. If again the evidence is uncontroverted that Plaintiff would have suffered *no* injuries as a result of the collision, absent the lack of a shoulder harness, then no issue is presented for the jury to determine what injuries and damages were proximately caused by the negligence of the original tortfeasors, *absent the negligence of those which proximately caused the lack of a rear seat shoulder harness*, and the special verdict form should not include questions directed to this issue. Rather, the special verdict form should permit the jury to determine which of the parties and non-parties (whether "original tortfeasors" or "crashworthiness tortfeasors) were negligent; whether the negligence of each of such parties and non-parties was a proximate cause of Plaintiff's injury and damages; the amount of damages sustained by the Plaintiff; and to compare the negligence of each party and non-party (whether "original tortfeasors" or "crashworthiness tortfeasors") found to be the proximate cause of the Plaintiff's injuries and damages. If, on the other hand, there is evidence from which a jury could properly find that Plaintiff would have sustained some injury or the same injury in the collision, absent any crashworthiness negligence or negligence which caused the lack of a rear seat shoulder harness (i.e., that Plaintiff would have sustained some or the same injury if he had been wearing a shoulder harness), the district court should avoid possible jury confusion which may be created by using the terms "design negligence claim" and "crashworthiness design negligence," and asking the jury to compare various persons' negligence on claims so described. Any special verdict or interrogatories should focus instead on the negligence of any parties or non-parties which proximately

caused injuries which the jury finds Plaintiff would have sustained if Plaintiff had been wearing a shoulder harness and a comparison of such negligence; and on the negligence of any parties or non-parties which proximately caused injuries to Plaintiff over and above those which Plaintiff would have sustained as a result of the collision, if he had been wearing a shoulder harness, and a comparison of such negligence.

For the foregoing reasons the judgment of the United States District Court for the District of New Mexico is VACATED and the case is REMANDED to the district court for a new trial.

6. Order of the Court of Appeals, *Cleveland v. Piper Aircraft Corp.*, 898 F.2d 778 (Mar. 16, 1990)

Edward Charles CLEVELAND, By and Through the Conservator of his Estate, Kathleen CLEVELAND; and Kathleen Cleveland, Individually, Plaintiffs-Appellants and Cross-Appellees,

v.

PIPER AIRCRAFT CORPORATION, a corporation, Defendant-Appellee and Cross-Appellant.

Nos. 86-2112, 86-2265.

United States Court of Appeals,
Tenth Circuit.

March 16, 1990.

Before SEYMOUR and EBEL, Circuit Judges, and RUSSELL, District Judge.*

ORDER ON PETITION FOR REHEARING

DAVID L. RUSSELL, District Judge.

Appellant and cross-appellee Edward Charles Cleveland has filed a petition for rehearing and a suggestion for rehearing *en banc*. Cross-appellee has filed a bill of costs. Appellee and cross-appellant Piper Aircraft Corporation has filed an objection to the bill of costs and has filed a motion for leave to file its own bill of costs.

The motion for rehearing is denied pursuant to 10th Cir.R. 40.1 and for the reasons stated below. Assuming that the

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*Honorable David L. Russell, District Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

findings in the special verdict may be understood to have determined, *inter alia*, that the negligence of each of the original tortfeasors was a proximate cause of all of Plaintiff's injuries, *see* Questions Nos. 2, 5 and 7A of the special verdict, set forth in full at footnote 2 of this Court's opinion filed November 15, 1989, *see Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540, 1543 n. 2 (10th Cir.1989), entry of judgment on the "design negligence claim" was error.[1] Question 7A did not permit the

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[1]On appeal, appellant urged that the district court erred in entering judgment on the "design negligence claim" rather than on the "crashworthiness design negligence claim." In the petition for rehearing, appellant and cross-appellee urges, *inter alia*, that this court affirm the judgment on the "design negligence claim," or direct that judgment be entered on that claim in the amount of $1,666,250.00 by adding the percentages of comparative negligence attributed to Piper Aircraft Corporation on both the "design negligence" and "crashworthiness design negligence" claims, *see* Questions 7A & 7B of special verdict, dividing by two and multiplying that percent times the total amount of plaintiff's damages found by the jury in Question No. 6.

Since the jury found that 100% of Plaintiff's injuries were attributable to crashworthiness, in effect appellant cross-appellee seeks affirmance of the judgment based upon a comparison of the negligence of the original tortfeasors, only, *as if* that constituted a comparison of their negligence to that of crashworthiness tortfeasors *on the crashworthiness design negligence claim*. This necessarily assumes that there were no other crashworthiness tortfeasors than those included in the special verdict form, *see* Question No. 7A, as original tortfeasors. Recognizing that comparing the negligence of those who caused or contributed in causing the accident, even if they are or include the same persons or entities whose negligence caused or contributed to causing crashworthiness injuries, may not be the same as comparing the negligence of all persons or entities who caused or contributed in causing the crashworthiness

jury to compare the negligence of each original tortfeasor with the negligence of each crashworthiness tortfeasor inasmuch as Plaintiff Edward Charles Cleveland and Defendant Piper Aircraft Corporation were not the only potential crashworthiness tortfeasors. There was evidence from which the jury could have found that certain non-parties were crashworthiness tortfeasors whose negligence caused Plaintiff's injuries. Question 7A of the special verdict did not permit the jury to compare the negligence of *these* alleged crashworthiness tortfeasors to the negligence of those who were either original tortfeasors (Robert Mudd) or both original and crashworthiness tortfeasors (Plaintiff and Defendant). Defendant objected to the special verdict form on the ground that the verdict form did not allow the jury to consider these non-parties as crashworthiness tortfeasors. On Defendant's cross appeal, we agreed that the trial court should have permitted the jury to assess in the special verdict these crashworthiness tortfeasors' negligence, which, coupled with our conclusion that New Mexico law requires that the negligence of original and crashworthiness tortfeasors be compared, *see Cleveland v. Piper Aircraft Corp.*, 890 F.2d at 1546 & 1551, prohibited our affirmance of the district court's judgment, as appellant/cross-appellee *now* urges is proper. *See id.* at 1545-46. ("If the verdict answers are reconcilable but not in a manner warranting entry of judgment on the crashworthiness design claim, the judgment must be affirmed unless other errors preclude affirmance; [i]f the verdict answers are reconcilable in a manner warranting entry of judgment on the crashworthiness

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injuries, either because they were original tortfeasors or crashworthiness tortfeasors, appellant and cross-appellee then urges an "add and divide formula" to attempt to approximate a comparison of the negligence of both original and crashworthiness tortfeasors in causing Plaintiff's crashworthiness injuries which the jury never made. Moreover, again the appellant and cross-appellee ignores that fact that there were other potential crashworthiness tortfeasors whose comparative negligence this "formula" does not account for.

design negligence claim, but the special verdict form did not, for example, permit the jury to compare the negligence of all those whose negligence may have caused or contributed in causing injuries Plaintiff received in the "second collision" or as a result of the lack of a rear seat shoulder harness, then we must vacate the judgment and remand this case to the district court for a new trial.")

In his combined reply and cross-appeal answer brief on appeal, appellant and cross-appellee suggested that any doubt concerning the irrelevance of the cause of the accident or the original tortfeasors' negligence to the cause of crashworthiness injuries should be resolved by certifying the "issue" to the New Mexico Supreme Court. In his petition for rehearing, appellant/cross-appellee again requests that the Court certify to the New Mexico Supreme Court "the issue of the original tortfeasors' legal responsibility for the victim's crashworthiness injuries," Petition for Rehearing at p. 12, because "[n]o New Mexico precedent exists as to the central issue raised by Mr. Cleveland's appeal." Although there are no decisions of the New Mexico Supreme Court or the New Mexico Court of Appeals addressing the specific issue of whether the negligence of original tortfeasors must be compared to the negligence of crashworthiness tortfeasors in a crashworthiness case, there is precedent in the decisions of the New Mexico Court of Appeals on proximate cause and the relationship between a tortfeasor whose negligence produces an initial injury and another tortfeasor whose negligence aggravates or enhances the original injury and in the decisions of both that court and the New Mexico Supreme Court on the application of comparative negligence, cited in the Court's opinion, 890 F.2d at 1549-51, which is controlling and which resolves the issue for which appellant and cross-appellee sought and seeks certification to the New Mexico Supreme Court pursuant to N.M. Stat.Ann. § 34-2-8 (1978).

Section 1 D of 1987 New Mexico Laws ch. 141, codified at N.M.Stat.Ann. § 41-3A-1(D) (Repl.Pamp.1989), is applicable only to cases filed after July 1, 1987, which does not include

this case. Appellant and cross-appellee cites no authority for his assertion that this section merely clarifies existing New Mexico law and the Court does not agree that that this is the case. In any event the jury in this case implicitly found that Plaintiff Edward Charles Cleveland suffered no distinct injuries or harm solely as a result of the original tortfeasors' negligence, *see* Question No. 5 of the special verdict, and the evidence was uncontroverted that Plaintiff would have suffered no injuries as a result of the collision, absent crashworthiness negligence *see* 890 F.2d at 1557, but suffered only one harm for which, under New Mexico law of proximate cause, which this section was not intended to change, *see* N.M.Stat.Ann. § 41-3A-1(G) (Repl.Pamp.1989) both the original and crashworthiness tortfeasors may be legally responsible, requiring a comparison of their negligence *inter se*.

The suggestion for rehearing *en banc* is also denied pursuant to F.R.App.P. 35(a) & (b).

Cross-appellee's bill of costs is denied and appellee and cross-appellant's motion for leave to file its bill of costs is denied, the judgment of the trial court having been vacated and neither party having completely prevailed in the cross-appeals. *See* F.R.App.P. 39(a).

7. U.S. Const., art. VI, cl. 2

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

8. Federal Aviation Act, §601(a), 49 U.S.C. App. §1421(a)

§ 1421. Powers and duties of Secretary of Transportation

(a) Minimum standards; rules and regulations

The Secretary of Transportation is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

(2) Such minimum standards governing appliances as may be required in the interest of safety;

(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Secretary of Transportation, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Secretary of Transportation may accept in lieu of those made by its officers and employees;

(4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Secretary of Transportation may find necessary to provide adequately for national security and safety in air commerce.

9. Affidavit of Fred E. Weick, dated Nov. 26, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

EDWARD CHARLES CLEVELAND, by and through the Conservator of his Estate, KATHLEEN CLEVELAND; and KATHLEEN CLEVELAND, Individually,	)	
Plaintiff,	)	
vs.	)	No. CIV-85-0062 M
PIPER AIRCRAFT CORPORATION, a corporation,	)	
Defendant.	)	

AFFIDAVIT OF FRED E. WEICK

FRED E. WEICK being first duly sworn states as follows:

1. That I graduated from the University of Illinois in 1922 with a degree in Mechanical Engineering. Immediately following graduation, I began a career in aviation engineering which lasted until my retirement from Piper Aircraft Corporation in 1969. Included in this 47-year period was employment with the United States Air Mail Service, the Bureau of Aeronautics of the Navy Department, 10 years with the National Advisory Committee for Aeronautics, 11 years as a Professor at Texas A & M doing aeronautical research and teaching and finally 12 years at Piper Aircraft Corporation as Director and Chief Engineer of the Development Center.

2. Piper began manufacturing the Cub, a small, fabric covered, single engine, high wing, two passenger aircraft, in 1937, with the Model J-3. The J-3 Cub utilized what was then the standard conventional gear or tailwheel aircraft design and had two tandem (fore and aft) seats with flight controls at each

seat. Because this predecessor of the Super Cub was reasonably priced, simple to maintain and easy to fly, it became one of the most popular airplanes in the history of aviation. Over 14,000 of these J-3 Cubs were manufactured and sold from 1938 to 1947, more than any other model aircraft.

3. Beginning in 1940, the L-4 Cub, a military version of the J-3 Cub, was also manufactured by Piper and nearly 6,000 of them were produced and extensively used during World War II as a trainer, artillery spotter, transport, ambulance and reconnaissance aircraft. The L-4 Cub, called the "Grasshopper" served in all major theatres of war, and more than 1000 of them took part in the Allied invasion of Europe in 1944. Most of the other aircraft utilized both before and during World War II, including the fighter aircraft for both the Allied and Axis powers, had tailwheel designs similar to the Cub and restricted pilot preflight forward visibility.

4. A pilot had to solo from the rear seat in both the J-3 and L-4 Cubs because the aircraft was too nose heavy to permit soloing from the front seat. Thousands of pilots made their first solo and dual instruction flights in these airplanes, more than in any other model.

5. The Cub's high wing, tailwheel design and stable flight characteristics made it known as the plane that did not need an airport because its low speed handling qualities and short field performance made many farmer's fields landing strips. A tail wheel design is advantageous when a pilot needs to keep his engine and propeller up in rough or soft terrain, and the Cub's characteristics were particularly suitable when slow flight and short takeoffs or landings were necessary and particularly for towing, floats, skis, traffic control, and power line, pipeline and forest fire patrol. A 1938 Piper J-3 Cub hangs on display in the National Air and Space Museum's General Aviation gallery because of its great popularity and impact on the public.

6. Piper began manufacturing the PA-18 Super Cub in 1949 and continued until 1982, commencing production again in 1988 which still continues. Nearly 10,000 Super Cubs have

been built and sold. The Super Cub had the same classic old style design of its predecessor J-3 and L-4 Cub models, tailwheel, two tandem seats and high fabric covered wing. It had, however, improved instrumentation and center of gravity so that it could be flown solo from the front seat.

FURTHER THE AFFIANT SAYETH NOT.

/s/ Fred E. Weick
FRED E. WEICK

STATE OF FLORIDA)
) ss
INDIAN RIVER COUNTY)

Subscribed, sworn to and acknowledged before me this 26th day of November, 1990 by Fred E. Weick.

WITNESS my hand and official seal.

/s/ Tammy C. Noon
Notary Public

My commission expires:

Notary Public, State of Florida
My commission expires: Sept. 13, 1992
Bonded Thru Notary Public Underwriters

10. Affidavit of Herbert M. Toomey,
dated Nov. 27, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

EDWARD CHARLES CLEVELAND, by and) through the Conservator of his Estate, KATHLEEN CLEVELAND; and KATHLEEN CLEVELAND, Individually,	)	
Plaintiff,	)	No. CIV-85-0062 M
vs.	)	
PIPER AIRCRAFT CORPORATION, a corporation,	)	
Defendant.	)	

AFFIDAVIT OF HERBERT M. TOOMEY

HERBERT M. TOOMEY being first duly sworn states as follows:

1. I have been a pilot for more than 60 years and worked for the Civil Aeronautics Administration and then its successor Federal Aviation Administration for 26 years from 1940 to 1966. From 1946 to 1954 I was Chief of the Aircraft Engineering Division for the Eastern Region which had the regulatory authority over Piper Aircraft Company (Piper). A copy of my resume is attached.*

2. The Piper Super Cub model aircraft was certified under Type Certificate Number 1A2 which was issued by the CAA on

* Resume not reproduced herein.

January 7, 1949 and reissued on January 30, 1974 by the FAA. This Certificate evidenced the fact that this aircraft model had been inspected and tested by the CAA and then the FAA and shown to meet the safety design and flight requirements established by the CAA and the FAA.

3. The Piper Super Cub, Model No. PA 18-150 in this case was issued its FAA Airworthiness Certificate when it was manufactured in March, 1970, showing that this aircraft complied fully with all applicable FAA design, manufacturing and production requirements, including those requirements relating to pilot visibility and to seat restraint systems. CAA and FAA regulations have never restricted rear seat pilot operations or required the installation of shoulder harnesses in this Piper Super Cub.

4. Since the early days of the Piper Cub, the predecessor of the Super Cub, the CAA and the FAA have been well aware of the aircrafts design characteristics and the limitation on forward visibility which was typical of all tail wheel aircraft, especially for the rear seat pilot while the tail wheel is on the ground. In 1951 I, in my capacity as Chief of the Aircraft Engineering Division, had some correspondence with Piper which concerned placarding the Super Cub against soloing from the rear seat when shoulder harnesses are installed. I understand that this correspondence was introduced in the first trial as Plaintiff's Exhibit 28. The CAA had, and I expressed in this correspondence, no objection to rear seat soloing in the Super Cub. The only concern I addressed in this correspondence which Piper satisfied was the need for a rear seat pilot to slip off the left shoulder strap of his shoulder harness in order to reach the Super Cub's fuel shut off valve.

5. The CAA and the FAA, the Federal Agencies responsible for aircraft safety never considered that tail wheel aircraft with their limited preflight forward visibility were unsafe and did not believe there was anything wrong or dangerous with the Super Cub's tailwheel design or with pilot operations from its rear seat. The CAA and then the FAA were also responsible for pilot training and certification including the instruction given

to tail wheel aircraft pilots in how to see that the runway is clear for take off and the side to side weaving technique utilized in ground maneuvers which readily overcame the pre-flight forward visibility limitation.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Herbert M. Toomey
HERBERT M. TOOMEY

STATE OF FLORIDA)
) ss
COUNTY OF INDIAN RIVER)

Subscribed and sworn to and acknowledged before me this 27th day of November, 1990.

Witness my hand and official seal.

/s/ Marcia Willoughby
Notary Public

My Commission Expires: 2-23-92

11. Affidavit of Richard E. Chandler,
dated Nov. 27, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

EDWARD CHARLES CLEVELAND, by and through the Conservator of his Estate, KATHLEEN CLEVELAND; and KATHLEEN CLEVELAND, Individually,	)	
Plaintiff,	)	No. CIV-85-0062 M
vs.	)	
PIPER AIRCRAFT CORPORATION, a corporation,	)	
Defendant.	)	

AFFIDAVIT OF RICHARD F. CHANDLER

RICHARD F. CHANDLER being first duly sworn states as follows:

1. I am a professional engineer and have specialized in the evaluation of seating and restraint systems. For a number of years I was the Manager of the Protection and Survival Laboratory of the Federal Aviation Administration's Civil Aeromedical Institute in Oklahoma City, Oklahoma. My work with the Federal Aviation Administration (FAA) demonstrated the ability of civil aviation seats and restraint systems to reduce crash injuries and resulted in changes in the Federal Aviation Regulations (FAR's) pertaining to seating and restraint systems. A copy of my resume listing my education and professional experience is attached hereto.*

* Resume not reproduced herein.

2. The Air Commerce Act of 1926 assigned to the U.S. Department of Commerce the regulatory responsibility for aviation operations. Through its aeronautics Branch, the Department of Commerce developed the first Federal airworthiness and other standards for aircraft in the United States. These regulations were known as the Air Commerce Regulations (ACR's), and became effective on December 31, 1926. Paragraph (A)3 of the ACR required "Safety belts or equivalent apparatus for pilots and passengers in open-cockpit airplanes carrying passengers for hire or reward." This apparently was the first requirement for seat belts in U.S. civil aircraft and also seems to have been the first occupant protection requirement. The ACR's were amended on January 1, 1931 to require safety belts or equivalent for pilot and passengers in all aircraft.

3. On January 18, 1973 the FAA issued a Notice of Proposed Rule Making which advised, among other things, that the FAA was considering requiring the installation of shoulder harnesses on all small civil airplanes manufactured after one year from the effective date of the proposed amendment, and/or on small civil airplanes manufactured prior to that date if they had structural provisions for the attachment of shoulder harnesses, and to require occupants of seats equipped with shoulder harnesses to use the shoulder harnesses during take-off and landing.

4. There was strong opposition to a rule requiring the installation of shoulder harnesses in small airplanes currently in service. The FAA decided that the decision as to whether to install shoulder harnesses in small airplanes then in service or to install shoulder harnesses in seats other than front seats should be left to the owner of the airplane. The final rule, adopted in June, 1977, required the installation of shoulder harnesses for the front seats of small airplanes manufactured after July 18, 1978. Shoulder harnesses for the rear seats were not required and the requirement was <u>not</u> made retroactive.

5. In the preamble to this rule change, the FAA stated:

". . . the FAA believes that sufficient data and information exists on which to base shoulder harness requirements for small airplanes. The changes being made are based primarily on the results and conclusions of small airplane accident investigations. Information regarding specific accidents is available in documents published by the National Safety Transportation Board such as the "Annual Review of General Aviation Accidents." In addition, a summary of test information on seats, belts, harnesses, as well as entire airplanes, is included in FAA Technical Report No. FS-70-592-120A, "A Summary of Crashworthiness Information for Small Airplanes," dated February, 1973. Furthermore, data which substantiate the premise that use of a harness will increase safety sufficiently to warrant a change in FAR Part 23 are contained in FAA report FAA-AM-71-3, "General Aviation Structures Directly Responsible for Trauma in Crash Decelerations," dated January, 1971. With respect to deferring rule making pending the results of crash testimony, the FAA does not believe delay is advisable since crashworthiness investigation, testing, and analysis is a continuing process, and updating of rules can be accomplished as new information becomes available should later revisions be warranted . . ."

6. With respect to the remaining (other than front seats) the FAA stated:

". . . the FAA's analysis of the cost benefit considerations show that small airplanes are operated mostly with only the front seats occupied and the cabin structure surrounding the occupants of seats other than front seats can be designed to be very effective in protecting

occupants during minor crash landings. Based on this and the many adverse comments to proposed Section 23.785(g), the FAA has determined that, at this time, shoulder harness installations on seats other than the front seats should not be required . . ."

7. On December 12, 1985, the FAA enacted Amendment 23-32 to the FAR's, which, for the first time, made shoulder harnesses mandatory for each seat in all small civil aircraft, like the Super Cub, which would be manufactured one year after December 12, 1985. The Federal regulations have never required the installation of shoulder harnesses in 1970 vintage aircraft such as the Piper Cub.

FURTHER THE AFFIANT SAYETH NOT.

/s/ Richard F. Chandler
RICHARD F. CHANDLER

STATE OF OKLAHOMA)
) ss
COUNTY OF CLEVELAND)

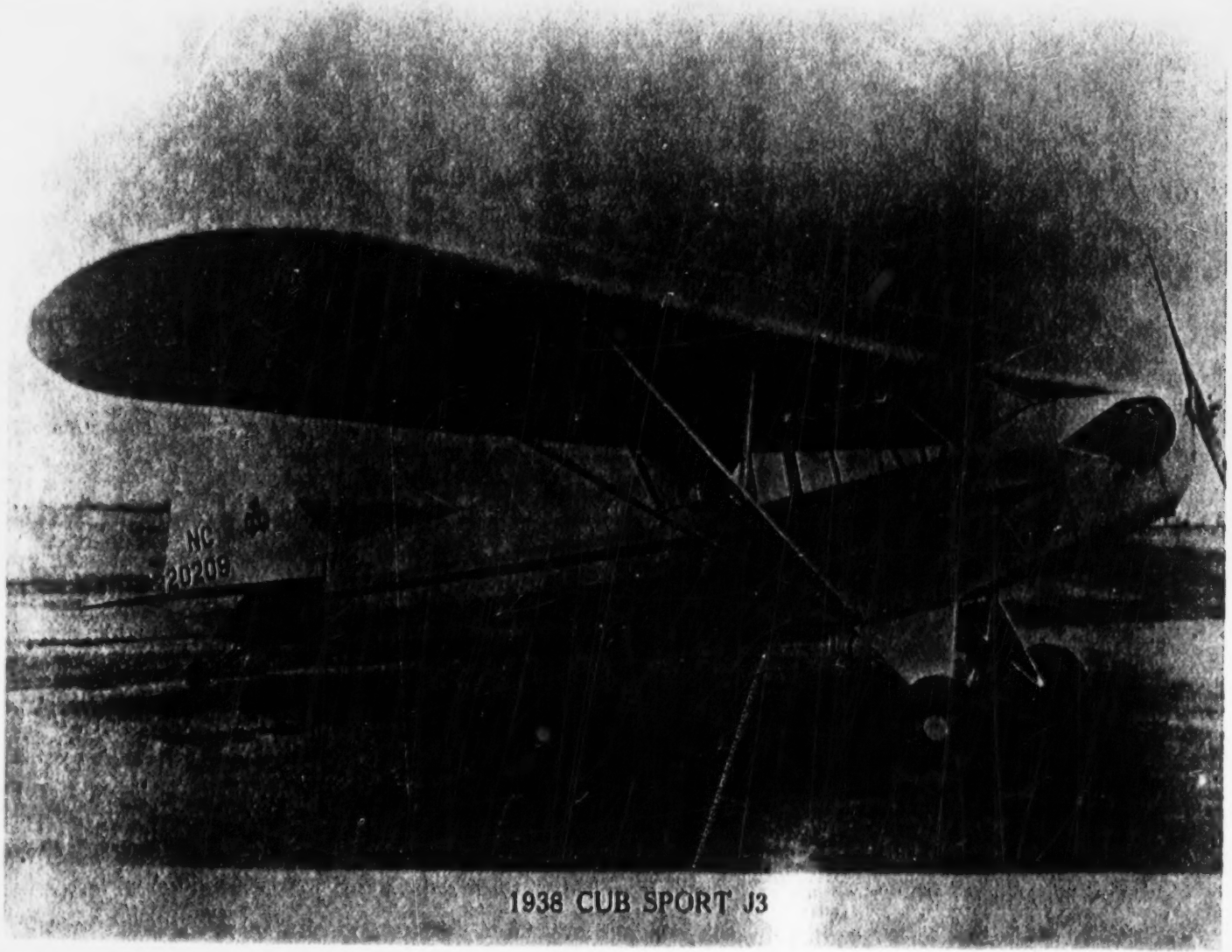
Subscribed, sworn to and acknowledged before me this 27th day of November, 1990 by Richard F. Chandler

WITNESS my hand and official seal.

/s/ Paula Crawford
Notary Public

My commission expires:
10/20/92

12. Photograph of Piper Cub



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13. Photograph of Piper Super Cub

PIPER
Super Cub
N83368